

Asylum Handbook

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Asylum Precedent in the Ninth Circuit

Country Index

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Notations indicating “Affirmed” or “Not Affirmed” refer to whether the Ninth Circuit panel agreed with the BIA or IJ on all forms of refugee relief (i.e. upholding a denial of asylum, but reversing on CAT is considered “Not Affirmed”).

This manual is not intended to express the views or opinions of EOIR.

January 2017 Edition

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- ✖ *Mosa v. Rogers*, 89 F.3d 601 (9th Cir. 1996)
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✓ *Affirmed*

✖ *Not Affirmed*

- ✖ *Nehad v. Mukasey*, 535 F.3d 962 (9th Cir. 2008); reversing and remanding a denial of a motion to reopen. Respondent asserted ineffective assistance from his lawyer in that he was confronted by him with the choice of either taking voluntary departure or having him withdraw as counsel. Counsel had opined that because of changes in Afghanistan, any asylum claim would be “weak.” The court found ineffective assistance and emphasized that Respondent had meritorious grounds to either pursue a claim for asylum and/or contest removability. POLLAK.

Well-Founded Fear/Objectively Reasonable, Found, Afghanistan (2008). Notwithstanding Respondent’s fear being based on the activities of the Taliban and their long since having been removed from power, the court held that there was ample evidence to make a successful claim from “fear of persecution by persons the Afghan government is unable or unwilling to control.” (at 972.)

Conviction/Vacated. Respondent’s conviction, which served as the basis for removability, had been vacated. The basis of the court’s action was not set out. The government argued that the vacation was for “rehabilitative or immigration reasons, not for any substantive or procedural defect in the conviction itself.” (at 973.) Respondent’s “moving papers focused on the immigration consequences of the conviction.” *Id.* “We have required the government to prove by clear and convincing evidence that the court’s *only* reasons for vacating the conviction were unrelated to any substantive or procedural defect. *Nath v. Gonzales*, 467 F.3d 1185, 1188-89 (9th Cir. 2006) (emphasis in original).” *Id.*

- ✖ *Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006) (b) (6); the panel’s finding that the respondent had been convicted of the aggravated felony of sexual abuse of a minor from his conviction for statutory rape was reversed by a unanimous en banc decision in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008). The Court based its reversal on finding

that the “conduct . . . is categorically broader than the generic definition of ‘sexual abuse of a minor.’”

Bars to Asylum/Particularly Serious Crime, Factors to Consider. The panel found that the factors set forth in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982) had not been properly applied. The panel found: “The BIA considered two of the *Frentescu* factors, the nature of the conviction, and the sentence imposed” as opposed to the “circumstances and underlying facts.” In particular the panel found it significant that there was no discussion as to “whether force was used.” The panel further emphasized that with regard to aggravated felonies where a sentence of less than five years of confinement was imposed, there can be no “per se” finding that such would be a particularly serious crime and that the *Frentescu* analysis must be followed.

CAT/More Likely Than Not, Not Found, Afghanistan (2006). The panel found that CAT relief had been properly denied in that it found that there were no “particular factors . . . to conclude that it is more likely than not that he would be tortured by the Afghan government or that it would acquiesce to his torture if he returns to his country.”

- ✱ *Abassi v. INS*, 305 F.3d 1028 (9th Cir. 2002) (b) (6); remanding for BIA to consider motion to reopen under CAT in light of the most recent country profile; W. FLETCHER.

Country Reports/Involving Pro Se Applicant. Regulation at 8 C.F.R. § 208.16(c)(2), which places the burden of proof on the applicant, does not require an alien to attach a government report that is easily available. “We do not suggest that the BIA must take administrative notice of a country profile when it is not mentioned in the motion, or that the BIA must track down other documents.” (at 1031). But when a *pro se* applicant mentions “recent Country Reports,” the Board must “consider the most recent relevant profile at the time it makes its decision.” (at 1032).

- ✱ *Mosa v. Rogers*, 89 F.3d 601 (9th Cir. 1996); remanding for IJ to consider asylum claim without reliance on the adverse credibility finding. BEEZER; superseded by statute, *Hose v. INS*, 180 F.3d 992 (9th Cir. 1999).

Credibility - Pre-REAL ID/Corroboration Provided (1996). Alien’s testimony regarding the spies at his school and his impressment into Afghan military service was found incredible simply because the IJ and BIA did not wish to believe him; there was no support for disbelieving that, as a suspected mujahidin sympathizer, Alien was given only one week of training before being made to parachute into mujahidin territory. Alien’s contention was supported by statements in the Country Report.

- ✱ *Nasseri v. Moschorak*, 34 F.3d 723 (9th Cir. 1994); remanding for AG to exercise [favorable] discretion; D.W. NELSON; *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

Political Opinion/Imputed, Found, Afghanistan (1994). Kidnappers questions regarding which group alien belonged to, how large the group was, and what their objective was, may have

betrayed their ignorance of the details of her participation in the National Islamic Front for Afghanistan (NIFA), but also indicated that alien's attackers believed she was a political enemy and that they were seeking to discover information about her political activities. Alien worked as a teacher, was an active member of the NIFA (a political group opposed to the government), and distributed leaflets.

Albania

Chronology

- ✖ *Belishta v. Ashcroft*, 378 F.3d 1078 (9th Cir. 2004)

- ✓ *Affirmed*

- ✖ *Not Affirmed*

- ✖ *Belishta v. Ashcroft*, 378 F.3d 1078 (9th Cir. 2004); staying mandate to allow BIA to reopen for consideration of atrocious past persecution. Alien sought relief under 8 C.F.R. § 1208.13(b)(1)(ii)(B) (effective January 5, 2001), providing relief for those who face “serious harm upon removal, even after conditions in the petitioner’s country have improved.” (at 679). The IJ found past persecution “but for the fact that the threats and attacks were not motivated by political opinion or any other protected ground,” but the Appeals Court did not rule on this finding. REAVLEY, W. FLETCHER, and TALLMAN.

Past Persecution/Humanitarian Asylum, Standard. “We emphasize that in order to be eligible for asylum under [8 C.F.R. § 1208.13 (b)(1)(iii)(B)], an applicant must still establish past persecution on account of a protected ground The applicant must also establish a reasonable possibility of fear of future ‘serious harm,’ although this threat need not result from any particular animus.” (at 1080; citing *Krastev v. INS*, 292 F.3d 1268, 1271 (10th Cir. 2002)).

Algeria

Chronology

- ✓ *Bellout v. Ashcroft*, 363 F.3d 975 (9th Cir. 2004)

✓ *Affirmed*

- ✓ *Bellout v. Ashcroft*, 363 F.3d 975 (9th Cir. 2004); affirming IJ denials of relief; SILVERMAN.

Bars to Asylum/Terrorist Bar, Affirmed, Algeria (2004). Alien who testified he was a member of the Armed Islamic Group (GIA), which is designated as a terrorist organization by the Department of State, and lived in their camps for three years, was therefore ineligible for asylum, statutory withholding and CAT withholding. Alien testified to one incident of abuse in 1994 at the hands of the government—a minimal showing of past persecution. *Cheema v. INS*, 350 F.3d 1035 (9th Cir. 2003), is distinguished because it was premised on the pre-IIRIRA statute’s two-pronged test. Alien failed to present evidence that members of militant groups who leave Algeria will be persecuted or tortured upon return and, therefore, did not qualify for CAT deferral. Compare *Cheema v. Ashcroft*, 383 F.3d 848 (9th Cir. 2004) (raising money that reached Sikh resistance organizations and having phone conversations with terrorists constitutes terrorist activities).

✗ *Not Affirmed*

Argentina

Chronology

- ✖ *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. 2004)

✓ *Affirmed*

✖ *Not Affirmed*

- ✖ *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. 2004); BIA's denial of withholding and CAT relief affirmed, but case remanded to determine if denial of asylum was based on timeliness issue or the merits. Applicant's testimony of persecution that occurred 10 years ago on account of UCR involvement was not credible, due to her deliberate flight through Mexico to the U.S. and waiting to file for asylum until she was placed in removal proceedings. Being blacklisted and on one occasion being pushed and threatened does not constitute persecution. Country Reports refuted her claim of a fear of torture. SILVER; (PAEZ, dissent: Asylum and withholding claims are factually interrelated and should both be remanded to avoid piecemeal resolution of claims.); *distinguished by Kasnecovic v. Gonzales*, 400 F.3d 812 (9th Cir. 2005).

Credibility - Pre-REAL ID/Implausibility, Not Affirmed, Argentina (2004). Although petitioner claimed she fled Argentina because of an attack in her home, the facts she (1) had applied for a passport a few weeks before the alleged attack, (2) carried a smuggler's contact information with her to Mexico, (3) left Mexico for the United States after only one week, and (4) didn't apply for asylum until she was placed in removal proceedings almost ten years later, supported IJ's determination the home invasion story was a post hoc justification. (at 934).

Persecution/Not Rising to Level Of, Argentina (2004). Although being blacklisted by the Menem government, and on one occasion being pushed, punched, called names, and threatened with her life if she continued her political activities, are reprehensible actions, "they are not so overwhelming so as to necessarily constitute persecution ... on account of political opinion." (at 934).

Well-Founded Fear/Continued Family Presence, Argentina (2004). Continued presence of similarly-situated family members in the country of origin without incident mitigates a well-founded fear. Even greater emphasis may be placed on the Country Report's lack of any mention of persecution of political party members or other political groups. (at 935).

Armenia

Chronology

- ✖ *Khudaverdyan v. Holder*, 778 F.3d 1101 (9th Cir. 2015)
- ✓ *Kulakchyan v. Holder*, 730 F.3d 993 (9th Cir. 2013)
- ✓ *Gasparyan v. Holder*, 707 F.3d 1130 (9th Cir. 2012)
- ✖ *Antonyan v. Holder*, 642 F.3d 1250 (9th Cir. 2011)
- ✖ *Kamalyan v. Holder*, 620 F.3d 1054 (9th Cir. 2010)
- ✖ *Baghdasaryan v. Holder*, 592 F.3d 1018 (9th Cir. 2010)
- ✖ *Karapetyan v. Mukasey*, 543 F.3d 1118 (9th Cir. 2008)
- ✖ *Grigoryan v. Mukasey*, 515 F.3d 999 (9th Cir. 2008), *withdrawn*, 527 F.3d 791 (9th Cir. 2008)
- ✖ *Vatyan v. Mukasey*, 508 F.3d 1179 (9th Cir. 2007)
- ✖ *Muradin v. Gonzales*, 494 F.3d 1208 (9th Cir. 2007)
- ✖ *Movsisian v. Ashcroft*, 395 F.3d 1095 (9th Cir. 2005)
- ✖ *Mamouzian v. Ashcroft*, 390 F.3d 1129 (9th Cir. 2004)
- ✖ *Abovian v. INS*, 219 F.3d 972 (9th Cir. 2000)
- ✖ *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000)
- ✓ *Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000)
- ✖ *Yazitchian v. INS*, 207 F.3d 1164 (9th Cir. 2000)
- ✖ *Mgoian v. INS*, 184 F.3d 1029 (9th Cir. 1999)
- ✖ *Andriasian v. INS*, 180 F.3d 1033 (9th Cir. 1999)

✓ *Affirmed*

- ✓ ***Kulakchyan v. Holder*, 730 F.3d 993 (9th Cir. 2013)**; upholding a finding of a frivolous I-589 filing with regard to the asserted date of entry. The application itself had been withdrawn in favor of a request for adjustment of status, which was then pretermitted. PER CURIAM.

Asylum Application/Frivolous, Found, Armenia (2013). The court approved of *Matter of XMC*, 25 I&N Dec. 322, 325-26 (BIA 2010), wherein the Board state that “‘the only action required to trigger a frivolousness inquiry is the filing of an asylum application’ and that the IJ and BIA ‘are not prevented from finding that an application is frivolous simply because the applicant withdrew the application or recanted false statements.’” 730 F.3d at 995 (citing 25 I&N Dec. at 325-26). The court did not accept the arguments that the date of entry was not “material” in that Respondent could have sought to establish entitlement to an exception to the one year filing requirement as well as that she had received “[a]dequate warnings through “‘thorough’ translation” of the I-589 and otherwise. *Id.*

- ✓ ***Gasparyan v. Holder*, 707 F.3d 1130 (9th Cir. 2012)**; upholding a finding that an application for asylum was untimely. Respondent was granted withholding of removal. Respondent sought to justify the delay based on mental health issues. The IJ found that the delay was due to lack of funds. The basis of the claim was domestic violence at the

hands of her husband. Respondent presented the testimony of a forensic psychologist, who opined that the delay in filing was reasonable because she had “an anxiety disorder and . . . symptoms of post traumatic stress disorder stemming from the abuse she suffered at the hands of her husband.” *Id.* at 1133. FARRIS

Bars to Asylum/Extraordinary Circumstances, Not Found, Armenia (2012). “To excuse her untimely asylum application, Gasparyan must establish that her psychiatric problems constituted extraordinary circumstances ‘directly related’ to her delay in filing for asylum.” *Id.* at 1134. The psychologist acknowledged that Respondent stated that the delay was attributable to the above factors, as well as “psychological trauma.” The Circuit accepted the administrative determination that her lack of funds and inability to speak English were the reasons for her delay in filing, not her mental health. In other words, “extraordinary circumstances,” as set forth at 8 C.F.R. § 1208.4(a)(5), were not demonstrated and the factors as set forth therein need not have been specifically applied. But even if their application would have been required, “reasons that correspond to the factors listed in the regulation” were provided for the administrative finding. *Id.* at 1135.

- ✓ *Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000); upholding denial of asylum and withholding; distinguished by *Ndom v. Ashcroft*, 384 F.3d 743 (9th Cir. 2004).

Persecution/Generalized Violence, Armenia (2000); Civil Strife/Claims Arising in Context Of, Armenia (2000). Petitioner failed to establish that an attack in which he sustained knife wounds was anything more than an act of random violence during a period of significant strife. An assertion that “old animosities between Azeris and Armenians still exist” is insufficient to establish a well-founded fear of persecution. (at 1089).

✕ *Not Affirmed*

- ✕ *Khudaverdyan v. Holder*, 778 F.3d 1101 (9th Cir. 2015) (b) (6); remanding to the BIA for further consideration of the applicants’ asylum and withholding of removal claims, as the BIA erred in either “incorrectly appl[ying] the test for imputed political opinion [as to the lead respondent] or simply neglect[ing] to consider the question of imputed opinion at all.” *Id.* at 1108. The lead respondent credibly testified that he was beaten after he talked back to the police chief who was a customer at the restaurant he managed. *Id.* at 1104. Later, the lead respondent was seen being questioned by a reporter about the incident, and was detained, beaten, and threatened by the military police. *Id.* The Circuit found an issue with whether the evidence demonstrated that the lead respondent was persecuted on account of an imputed political opinion, namely, perceived whistleblowing. GRABER. (Owens, J. concurring); (Kleinfeld, J., dissenting, on the ground that substantial evidence supported the Board’s decision that the lead respondent’s mistreatment was not on the basis of an imputed political opinion, but rather due to his insult to the police chief: “The BIA considered these claims and found them to be without merit.” *Id.* at 1111.).

Political Opinion/Imputed, Whistleblowing, Not Affirmed, Armenia (2015). The Circuit held that “one form of imputed political opinion is perceived whistleblowing,” and that “an applicant . . . may demonstrate persecution on account of a protected ground if he or she shows that the persecutor *thought* that the applicant was attempting to expose corruption in a governing institution and mistreated the applicant as a result, even if the applicant in fact had no such intention.” *Id.* at 1106 (emphasis in original).

- * ***Antonyan v. Holder*, 642 F.3d 1250 (9th Cir. 2011)** (b) (6); reversing a denial of relief to a whistle-blower who “faces retaliation from a notorious criminal who is protected by corrupt government officials.” *Id.* at 1252. This is a pre-REAL ID ACT case. Credibility was not at issue. There was a claim of physical violence and threats. The Board’s recent whistle-blowing case of *Matter of N-M*, 25 I&N Dec. 526 (BIA 2011) was not cited or discussed. THOMAS.

Political Opinion/Whistleblowing, Not Affirmed, Armenia (2011). The basis of the BIA’s denial was that the problems experienced “were not ‘inextricably intertwined with a government operation’ but instead ‘simply were the actions of an angry criminal who sought revenge after [Antonyan] reported him to the police.’” *Id.* at 1254 (brackets in original). The court reviewed its pertinent case law on whistle-blowing. *Id.* “Whistle-blowing against government corruption is an expression of political opinion.” *Baghdasaryan v. Holder*, 592 F.3d 1018, 1024 (9th Cir. 2010). “In determining whether an act of whistle-blowing is political, the ‘salient question’ is whether it was ‘directed toward a government institution, or only against the individuals whose corruption was aberrational.’” *Hasan v. Ashcroft*, 380 F.3d 1114, 1120 (9th Cir. 2004) (quoting *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000)). “In pursuing Andranik’s prosecution [the criminal whose acts she had observed], Antonyan sought more than an end [to his criminal acts]; she also hoped to expose his crooked ties to law enforcement agencies who refused to protect the citizenry.” at 1255.

Political Opinion/Personal Dispute, Not Affirmed: “That her initial reports stemmed from a ‘personal dispute’ does not render her later acts any less ‘political,’ however.” *Id.* (citing *Zhu v. Mukasey*, 537 F.3d 1034, 1045 (9th Cir. 2008) (finding that respondent had whistle-blower status because her actions against the person who raped her was found to be a form of “political dissent.”)). “[W]here a persecutor has both personal and political motives for retaliating against a political opponent, the persecutor’s mixed motives do ‘not render the opposition any less political, or the opponent any less deserving of asylum.’” *Id.* at 1256 (quoting *Zhu*, 537 F.3d at 1043); see *Fedunyak v. Gonzales*, 477 F.3d 1126, 1130 (9th Cir. 2007) (nexus established where persecution was motivated by both personal greed and petitioner’s complaints about government extortion). “[A] victim who is targeted for exposing government corruption is persecuted ‘on account of’ political opinion.” *Id.* (quoting, *Sagaydak v. Gonzalez*, 405 F.3d 1035, 1042 (9th Cir. 2005) (characterizing the uncovered corruption that was within a private entity as “political” in the context of “the country’s evolving politics”)).

- * ***Kamalyan v. Holder*, 620 F.3d 1054 (9th Cir. 2010)** (b) (6); reversing a denial of relief to a Jehovah’s Witness who faced problems while proselytizing. The IJ had found

past persecution but had denied relief based on changed country conditions. NOONAN. There was a dissent on this issue by HALL.

Changed Country Conditions/Personal Testimony; Changed Conditions Not Found, Armenia (2010). The dissent noted that the Department of State Country and Religious Freedom reports in the record “indicated that the status and official treatment of Jehovah’s Witnesses and other minority religions in Armenia had fundamentally changed.” The majority noted that respondent testified that “his religion was legalized.” Regarding proselytizing, he noted that “should be [possible] because the faith itself is now legal.” However, the respondent expressed concern that he would still face problems because the changes were “only on paper.”

Changed Country Conditions/Reliance on Country Reports. “A State Department Report on country conditions, standing alone, is not sufficient to rebut the presumption of future persecution when a petitioner has established past persecution.” *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1074 (9th Cir. 2004). Those reports “are not amenable to an ‘individualized analysis’ tailored to an individual’s particular situation.” *Id.* at 1074. The decision went on to cite other portions of the reports which indicated that conditions in Armenia had not sufficiently changed to justify the denial.

- * *Baghdasaryan v. Holder*, 592 F.3d 1018 (9th Cir. 2010) (b) (6)); reversing a denial of relief to a “whistleblower” who asserted a claim based on threats and physical violence with regard to his protesting illegal demands for money by family members “on behalf” of a powerful local political figure. Respondent was found to be credible. PREGERSON.

Political Opinion/Imputed, Found, Armenia (2010). The circuit noted that “the BIA found ‘very little indication’ that the Armenian government was imputing any political opinion to respondent and that he was merely the victim of criminal misconduct.” The circuit rejected this conclusion, holding that “opposition to government corruption is an expression of political opinion,” citing *Fedunyak v. Gonzales*, 477 F.3d 1126, 1129 (9th Cir. 2007). The circuit also rejected the Board’s finding that there was “no evidence of any basis for his mistreatment, other than his failure to pay the money requested,” citing *Zhu v. Mukasey*, 537 F.3d 1034, 1045 (9th Cir. 2008) (“a Chinese factory worker wrote a letter to the town government after her supervisor, who was also a government official, raped her”); *Hasan v. Ashcroft*, 380 F.3d 1114, 1120 (9th Cir. 2004) (“finding political opinion where a journalist wrote a newspaper article criticizing a corrupt government official”). The circuit recognized that some of the “harm” respondent experienced was “motivated by personal greed” and that there was no showing of “systematic corruption,” but did not find that such changed the outcome.

Nexus/Pre REAL ID Standard. The circuit notes that because the application was filed before the effective date of the REAL-ID Act, nexus is evaluated according to the ‘on account of’ standard, rather than the ‘central reason’ standard.

- * *Karapetyan v. Mukasey*, 543 F.3d 1118 (9th Cir. 2008) (b) (6)); reversing and remanding a denial based on failure to corroborate a claim, inadequate demonstration of past persecution, and lack of compliance as to submission of fingerprints for security checks. Respondent was found to have testified credibly as to being detained, having

received ethnic slurs, and physical mistreatment. The basis of the claim was ethnicity and political opinion. PREGERSON.

Credibility/Corroboration Not Required, Armenia (2008). “When an applicant has been found to testify credibly . . . no further corroboration is required.”

Persecution/Physical Harm Not Necessary, Armenia (2008). Past persecution has not been found “because Karapetyan did not seek medical attention.” The court cited to *Surita v. INS*, 95 F.3d 814 (9th Cir. 1996): “threats and attacks constitute past persecution even where an applicant has not been beaten or physically harmed. The court also cited *Lopez v. Ashcroft*, 366 F.3d 799 (9th Cir. 2004).

Persecution/Cumulative Effect, Armenia (2008). Such may be established “because of the cumulative impact of several incidents even where no single incident would constitute persecution on its own.” The court cited *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004).

Security Clearance/Failure to Submit Fingerprints. It is error where respondent was not given additional time to submit his fingerprints for the required security checks as he had been directed. The court cited with approval what it termed the “similar” case of *Cui v. Mukasey*, 538 F.3d 1289 (9th Cir. 2008) where the personal circumstances of the applicant were found to have justified the same and “he did not receive adequate notice of the fingerprint requirement.

✱ *Grigoryan v. Mukasey*, 515 F.3d 999 (9th Cir. 2008), *withdrawn*, 527 F.3d 791 (9th Cir. 2008).

✱ *Vatyan v. Mukasey*, 508 F.3d 1179 (9th Cir. 2007) (b) (6); reversing and remanding a denial of asylum on the basis of the non-consideration of the purported documents from the government of Armenia, which had not been certified under 8 C.F.R. §287.6(c). The IJ denied the claim on credibility grounds. The IJ also read *Khan v. INS*, 237 F.3d 1143 (9th Cir. 2000), to require documents offered from a foreign government to be authenticated in some way other than by self-serving statements from the alien himself. FISHER. There was a dissent by CLIFTON, who notes: “The message to IJs from this decision is to admit all proffered evidence...” (at 1188).

Evidence/Authentication, Weight. The court cited a number of decisions which excuse aliens from complying with this requirement. *Ding v. Ashcroft*, 387 F.3d 1131, 1135 (9th Cir. 2004); *Liu v. Ashcroft*, 372 F.3d 529 (3rd Cir. (2004); *Yan v. Gonzales*, 438 F.3d 1249 (10th Cir. 2006); *Lin v. Dept. of Justice*, 428 F.3d 391 (2nd Cir. 2005); *Shtaro v. Gonzales*, 435 F.3d 711 (7th Cir. 2006). In other words, the documents must have been considered and if found not to be authentic, it would go to the weight that may have been assigned to them.

✱ *Muradin v. Gonzales*, 494 F.3d 1208 (9th Cir. 2007) (b) (6); reversing and remanding denials of CAT and asylum. The respondent had been a soldier in the Armenian army. He testified that he had been badly beaten, detained, and forced to work for the private benefit of any officer while in the army. An IJ denied asylum but granted protection under CAT. Both sides appealed. The Board upheld the asylum denial but reversed the grant under CAT. The court accepted the denial of asylum on the imputed

political opinion theory, but remanded to consider respondent's claim of being a member of a particular social group. The court also reversed the denial of CAT protection. BRIGHT (sitting by designation from the Eighth Circuit).

Administrative Proceedings/IJ Failure to Address a Claim. The IJ's failure to address a portion of the respondent's claim compelled a remand. (at 1210) (citing *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005); *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040-41 (9th Cir. 2005); *Navas v. INS*, 217 F.3d 646, 658 n.16 (9th Cir. 2000)). The proposed social group was "former soldiers."

CAT/Torture, Found, Armenia (2007); More Likely Than Not, Found, Armenia (2007); Country Reports/To Support Claim, Sufficient, Armenia (2007). The Board's finding that the respondent had not been tortured was reversed outright. So was the assessment by the Board that he had not shown that he "would likely be tortured upon return." In making that assessment, the court relied on Department of State information from the period 1998 to 2001. "The report indicated that the number of conscript deaths from physical abuse decreased 18% between 1999 and 2001, the report also stated that there are between sixteen to twenty non-combat deaths per month." (at 1211).

✱ *Movsisian v. Ashcroft*, 395 F.3d 1095 (9th Cir. 2005) (b) (6)); remanding for the BIA to state the grounds on which it was denying the motion to reopen; but affirming a finding that the alien had not established a well-founded fear of persecution on religious grounds; TASHIMA; (GOODWIN, concurring in part and dissenting in part on procedural grounds).

Religion/Pentecostal Christian. Pentecostal Christian testified as to acts of harassment against his mother for her practicing of her religion and offered expert opinion testimony on problems of the free practice of the Pentecostal religion, expressing a fear that he "would be punished for his refusal to obey any orders that conflicted with his religious beliefs," but presented no evidence that Armenian government would target him for conscription or punishment on account of his religion.

Persecution/Forced Conscription, Armenia (2005). "[F]orced conscription or punishment for evasion of military duty generally does not constitute persecution on account of a protected ground. See *Castillo v. INS*, 951 F.2d 1117, 1122 (9th Cir. 1991) ('The fact that a nation forces a citizen to serve in the armed forces along with the rest of the country's population does not amount to persecution.')" *Id.* at 1097. See also *Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992) (noting the "long-standing rule that it is not persecution for a country to ... require military service of its citizens").

Nexus/Motive Not Found, Pre REAL ID, Armenia (2005). "[Alien] presented no evidence that the Armenian government would target him for conscription or punishment on account of his religion or other protected ground. See *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (holding that religious conscientious objectors did not establish religious persecution because they did not show that the government intended to persecute them for their beliefs)." (at 1097).

- ✱ ***Mamouzian v. Ashcroft*, 390 F.3d 1129 (9th Cir. 2004)**; affirming IJ denial of withholding and CAT, but remanding upon finding petitioner statutorily eligible for asylum; REINHARDT.

Persecution/Physical Harm, Not Affirmed, Armenia (2004); Detention, Not Affirmed, Armenia (2004); Threats Alone, Not Affirmed, Armenia (2004). Three instances of beating and kicking by government officials, one of which caused petitioner to lose consciousness, two instances of incarceration for political expression, and threats to her life by government officials constitutes persecution, contrary to the IJ's finding the abuse was too gentle to rise to the level of persecution. Death threats alone in conjunction with detention, attacks, "or even close confrontations," justify a finding of past persecution. (at 1130-34).

Nexus/Motive, Evidence Standard, Pre REAL ID, Armenia (2004). "An applicant need only produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground. *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (en banc); see also *Aghbuya v. INS*, 241 F.3d 1224, 1228 (9th Cir. 2001)." (at 1134).

Political Opinion/Found, Armenia (2004). Arrests and beatings for expressing opposition to the economic policies of the ruling HeHeShe party, as implemented in a state-run factory, qualifies as persecution on account of political opinion and was not merely opposition to corrupt individuals. (at 1134).

Nexus/Retribution, On Account of Protected Ground, Armenia (2004). Retaliation against an individual who opposes government corruption —corruption which is "inextricably intertwined with governmental operation," as opposed to "individuals whose corruption was aberrational" — can constitute persecution on account of political opinion. (at 1134-35) (citing *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000); *Hasan v. Ashcroft*, 380 F.3d 1114, 1120-21 (9th Cir. 2004); *Njuguna v. Ashcroft*, 374 F.3d 765, 770-71 (9th Cir. 2004)).

Well-Founded Fear/Objectively Reasonable, Found, Armenia (2004); Objective Evidence, Cultural Milieu; Ten Percent Rule, Not Affirmed Armenia (2004). Successful evasion of government authorities and flight from the country does not make a fear of future persecution any less objectively reasonable. (at 1137). "'The reasonableness of the fear must be determined in the political, social and cultural milieu of the place where the petitioner lived[,] and even a ten percent chance of persecution may establish a well-founded fear.' *Khup [v. Ashcroft]*, 376 F.3d 898, 904 (9th Cir. 2004)] (alteration in original) (internal citations and quotation marks omitted); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001)." (at 1135-36).

- ✱ ***Abovian v. INS*, 219 F.3d 972 (9th Cir. 2000)**; remanding to allow petitioner reasonable opportunity to explain perceived deficiencies; includes a broad discussion on how adverse credibility findings must be crafted to show specific and cogent inconsistencies that go to the heart of the claim; PREGERSON; (WALLACE, order amending dissent at 234 F.3d 492 (9th Cir. 2001): Majority decided a constitutional issue not briefed by the parties; decision should be upheld simply because petitioner failed to present sufficient evidence.); *reh'g en banc denied*, 257 F.3d 971 (9th Cir. 2001). (KOZINSKI, SCANNLAIN, TROTT, T.G. NELSON, KLEINFELD, GRABER, TALLMAN and RAWLINSON, dissent: The majority effectively inverts the standard by saddling the BIA with the burden of proving that petitioner is *not* entitled to relief.)

Administrative Proceedings/Judicial Review. “While today’s opinion is particularly egregious, this case is hardly atypical of our circuit’s immigration law jurisprudence. Rather, it is one more example of the nitpicking we engage in as part of a systematic effort to dismantle the reasons immigration judges give for their decisions. *See, e.g., Martirosyan v. INS*, 229 F.3d 903 (9th Cir. 2000), *vacated and reh’g en banc granted*, 242 F.3d 905 (9th Cir. 2001) (the IJ could not dismiss as ‘speculative’ a draft dodger’s claim that had he remained in Armenia he would have been forced to commit war crimes, despite the complete absence of evidence that *any* Armenian soldier had *ever* been compelled to commit such acts; *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000) (petitioner established her eligibility for asylum where she first testified to being raped for a nondiscriminatory reason and only after coaching by her counsel said that she was also raped because of her ethnicity); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (the IJ may not doubt petitioner’s credibility after he made numerous inconsistent statements between his application and his testimony about how and when he was beaten by the police); *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000) (despite the admission of petitioner’s expert, the BIA lacked substantial evidence to conclude that Armenians in Russia were not subject to a pattern or practice of persecution). None of this has anything to do with administrative law, as that concept is known anywhere outside the Ninth Circuit. Nor has it anything to do with the laws Congress has passed and the Supreme Court has interpreted. I emphatically dissent.” (Dissent to order denying reh’g en banc, 257 F.3d at 980–81).

✱ *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000). *See* **Russia** (ethnic Armenian who was citizen of both Azerbaijan and Russia).

✱ *Yazitchian v. INS*, 207 F.3d 1164 (9th Cir. 2000); granting withholding; THOMAS; *distinguished by Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000).

Political Opinion/Found, Armenia (2000); Persecution/Extortion. “Extortion demanded or extracted by the government, in part because of the petitioner’s political opinion, can constitute persecution on the basis of a statutorily protected ground. *See Desir v. Ilcherto*, 840 F.2d 723, 727 (9th Cir. 1988).” (at 1168).

Nexus/Motive, Evidence Standard, Pre REAL ID, Armenia (2000). *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992), “did not preclude claims where persecution took the form of extortion based on imputed political opinion: it merely required ‘direct or circumstantial’ evidence of a motive founded on one of the statutorily protected grounds.” (at 1168).

✱ *Mgoian v. INS*, 184 F.3d 1029 (9th Cir. 1999); granting withholding and remanded for an exercise of discretion to grant asylum; applicant received threats and other family members experienced physical violence; BRIGHT; (RYNER, dissent: persecution was not based on a statutorily protected ground).

Well-Founded Fear/Pattern or Practice, Not Affirmed, Armenia (1999). “[A] pattern of persecution targeting a given family that plays a prominent role in a minority group that is the

object of widespread hostile treatment supports a well-founded fear of persecution by its surviving members.” (at 1036).

Particular Social Group/Family, Not Affirmed, Armenia (1999). While the death of one family member does not automatically entitle the entire family to asylum, when all of petitioner’s principal family members are subjected to forms of violence, persecution and harassment as members of the Kurdish-Moslem intelligentsia, it is reasonable to infer that the family has become a specific target of those with a generalized hatred of Kurdish-Moslems in Armenia. (at 1036).

Nexus/Motive Found, Pre REAL ID, Armenia (1999). “There can be no basis for finding a well-founded fear of persecution unless the group (whatever it is) has been persecuted by the government or by forces beyond its control on account of a trait such as ethnicity, religion, or political beliefs that are common to the entire group.” (dissent at 1038).

- ✕ *Andriasian v. INS*, 180 F.3d 1033 (9th Cir. 1999). See **Azerbaijan** (ethnic Armenian who fled Azerbaijan).

Azerbaijan

Chronology

- ✓ *Zamanov v. Holder*, 649 F.3d 969 (9th Cir. 2011)
- ✗ *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000)
- ✓ *Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000)
- ✗ *Andriasian v. INS*, 180 F.3d 1033 (9th Cir. 1999)

✓ Affirmed

- ✓ *Zamanov v. Holder*, 649 F.3d 969 (9th Cir. 2011) (b) (6); affirming a denial of relief on credibility grounds in this pre-REAL ID Act case. Respondent submitted an I-589, without the assistance of an attorney, in which he listed various persecutory acts. At his asylum interview he was advised by a non-lawyer that he should only recite orally what he had written. He omitted a number of persecutory acts. Prior to his hearing, he obtained counsel and then submitted a supplemental declaration to document the additional acts. CLIFTON.

Credibility - Pre-REAL ID/Inconsistencies, Material, Before Asylum Adjudicator.

"Inconsistencies regarding events that form the basis of the asylum claim are sufficient to support an adverse credibility determination." *See Ceballos-Castillo v. INS*, 904 F.2d 519, 520 (9th Cir. 1990). "Testimony about the events leading up to the petitioner's departure, or about the circumstances that led to the persecution, go to the 'heart of the claim.'" *See Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir.2001) (testimony as to the number of times applicant was arrested before his departure went to the heart of the claim); *Don v. Gonzales*, 476 F.3d 738, 741 (9th Cir.2007). "We have found a material alteration where an asylum applicant presented substantially different accounts of mistreatment in successive asylum petitions, or changed the basis of his claim of political persecution between his asylum application and subsequent testimony." (at 973).

Credibility - Pre-REAL ID/Explanation of Inconsistencies. Respondent's offered explanation "that he had been told by the man who prepared his asylum application that he should not mention events that were not in the written application . . . that his new attorney urged him to correct his earlier omissions—is plausible." However, the circuit found "it was not unreasonable for the IJ to conclude that Zamanov was not being candid when he told that officer that he had nothing to add to his asylum claim." (at 974).

- ✓ *Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000); *See Armenia* (violence on the Azeri-Armenian border).

✖ Not Affirmed

- ✖ *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000); See **Russia** (ethnic Armenian who was citizen of both Azerbaijan and Russia).
 - ✖ *Andriasian v. INS*, 180 F.3d 1033 (9th Cir. 1999) (b) (6); remanding to grant asylum; REINHARDT.
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Bars to Asylum/Firm Resettlement, Not Found, Azerbaijan (1999). Ethnic Armenian family fled ethnic cleansing in Azerbaijan and clearly established past persecution based on physical attacks and threats, only to face discrimination and persecution in Armenia based on their religion and accent. The family's nomadic stay in Armenia was not "undisturbed," and therefore did not qualify as firm resettlement. A discretionary denial of asylum based on firm resettlement is permitted only if the alien would not face harm *or* persecution in the third country; an alien need not demonstrate the likelihood of persecution—a lesser form of threatened injury is enough. The burden is on the government to demonstrate the alien *would not* be subject to harm in the third country. (at 1045). See 8 C.F.R. § 208.13(d). "Together, the mandatory and discretionary regulations set forth the minimum conditions under which a petitioner may be denied asylum because he has an opportunity to reside permanently in a third country. Under the regulations, the circumstances must show that he has established, or will be able to establish, residence in another nation, and that he will have a reasonable assurance that he will not suffer further harm or persecution there." (at 1046).

Country of Removal/Designation. Last-minute designation of Armenia as the country for removal violated due process by not allowing alien to present evidence of persecution in Armenia. (at 1041).

Persecution/Threats Alone, Not Affirmed, Azerbaijan (1999). "[T]he warning that the [petitioners] would be killed if they did not leave Azerbaijan immediately – which was made all the more credible by the fact that the Azeri thugs who issued the threat had just murdered [their] neighbor in cold blood – would by itself be sufficient to establish past persecution." (at 1042).

Unable or Unwilling to Control/Nationwide Basis. Widespread nature of persecution of ethnic Armenians, combined with police officer's discriminatory refusal to assist, clearly establishes the government of Azerbaijan either could not or would not control Azeris who sought to threaten and harm ethnic Armenians. (at 1042–43).

Bangladesh

Chronology

- ✖ *Alphonsus v. Holder*, 705 F.3d 1031 (9th Cir. 2013)
- ✖ *Ahmed v. Keisler*, 504 F.3d 1183 (9th Cir. 2007)
- ✓ *Gomes v. Gonzales*, 429 F.3d 1264 (9th Cir. 2005)
- ✖ *Hasan v. Ashcroft*, 380 F.3d 1114 (9th Cir. 2004)
- ✖ *Hoque v. Ashcroft*, 367 F.3d 1190 (9th Cir. 2004)
- ✖ *Khan v. INS*, 237 F.3d 1143 (9th Cir. 2001)

✓ *Affirmed*

- ✓ *Gomes v. Gonzales*, 429 F.3d 1264 (9th Cir. 2005) (b) (6); upholding a denial of relief on the basis of a failure to demonstrate the objective component of the claim. The court relied on Department of State reports to support that assessment. The petitioners were a Catholic family who expressed the fear that they would be persecuted by “Muslim extremists” on account of their religion. The lead petitioner’s brother “who engaged in religious activism” had been killed by a “Muslim extremist.” The police had responded to “the extent it was able” but ineffectively. The court found that instances of “harassment” on the way to the church” would not constitute persecution. CALLAHAN.

Changed Country Conditions/Internal Relocation Possible, Bangladesh (2005); Changed Conditions Found, Bangladesh (2005). Respondents had lived in the capital city “without incident.” Other remaining family in Bangladesh had also moved to the capital city and “only experienced harassment...the respondents can safely relocate.”

✖ *Not Affirmed*

- ✖ *Alphonsus v. Holder*, 705 F.3d 1031 (9th Cir. 2013) (b) (6); remanding a denial of relief on the basis of finding that Respondent had been convicted of a particularly serious crime (PSC), but upholding a denial of relief under CAT. Respondent had been convicted of various offense including “petty theft with priors, “as well as resisting an executive officer” (resisting arrest). His status as an aggravated felon made him ineligible for asylum, a ruling which was not challenged. However, the PSC determination (from the latter conviction) was found to make him statutorily ineligible for withholding of removal. His claim was based on the risk he would face if he had to return to Bangladesh because of his Pentecostal faith. BERZON. Dissent by GRABER.

Bars to Asylum/Particularly Serious Crime, Not Found, Bangladesh (2013). The Circuit found that the Board’s reasoning as to why the conviction was a PSC was “ambiguous” and could not

be considered as an adequate exercise of administrative discretion. In particular, the Board's decision seemed to depart from its prior case law which focused heavily on "whether the nature of the crime is one which indicates that the alien poses a danger to the community." At 1039.

CAT/Acquiescence, Affirmed, Bangladesh (2013). The Circuit accepted the administrative determination "that the Bangladeshi government is making an effort to improve religious harmony in the country" and that "the record is insufficient to demonstrate that [Alphonsus] is likely to be tortured by the government or by private actors with the acquiescence of governmental authorities given his status as a Pentecostal." At 1036.

- * *Ahmed v. Keisler*, 504 F.3d 1183 (9th Cir. 2007) (b) (6); reversing and remanding a denial of relief. The respondent is an ethnic Bihari- a minority group within Bangladesh. He participated in political demonstrations protesting on behalf of rights for his ethnic group and had been "beaten." His brother who had also been an activist "disappeared" at the hands of political opponents. The respondent and his family were found to be members of a "disfavored group." Credibility was not at issue. PREGERSON. There was a dissent by RAWLINSON.

Well-Founded Fear/Ten Percent Rule, Not Affirmed, Bangladesh (2007). The court repeated its long held position that: "Even a ten percent chance that the applicant will be persecuted in the future is enough to establish a well-founded fear." *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004) (quoting *Knezevic v. Ashcroft* 367 F.3d 1206, 1212). In making that determination, "[t]he key question is whether looking at the cumulative effect of all the incidents a petitioner has suffered, the treatment [he or] she received rises to the level of persecution." *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998). Violence directed at a family member "provides additional support for a claim of persecution." *Baballah v. Ashcroft*, 367 F.3d 1067, 1074-75 (9th Cir. 2004)

Particular Social Group/Disfavored Group, Not Affirmed, Bangladesh (2007); Political Opinion/Found, Bangladesh (2007). Although respondent claimed no "political opinion" by virtue of his activities on behalf of members of his ethnic group, he was found to have a successful claim.

Unable or Unwilling to Control/Private Agent, Bangladesh (2007). The fact that a family member was kidnapped by the opposing political party did not preclude the claim from being granted. Relying on *Korablina*, 158 F.3d 1038 at 1044, the court found that, "acts of harassment or violence perpetrated by an entity that the government fails to control can constitute evidence of persecution." (at 1196).

CAT/Torture, Not Found, Bangladesh (2007). The denial of CAT relief was upheld. With support from *Hasan v. Ashcroft*, 380 F.3d 1114, 1120-23 (9th Cir. 2004), the court concluded that "[t]he evidence in the record compels a finding that it is more likely than not that Ahmed will be persecuted if returned to Bangladesh...it is not clear that these actions [beatings, threats, and the disappearance of a relative] would rise to the level of torture." (at 1201).

- * *Hasan v. Ashcroft*, 380 F.3d 1114 (9th Cir. 2004); remanding to determine whether presumption of future persecution has been rebutted; denial of CAT relief sustained; D.W. NELSON. (Whistleblower case.)

Political Opinion/Found, Bangladesh (2004). Female newspaper reporter's articles criticizing the corruption of an important government leader in the region and describing "an institutionalized level of corruption that goes far beyond an individual, anomalous case," lead to attacks on her husband and parents and a warrant poster calling for punishment for her journalism and anti-Islamic activities, which qualifies as persecution on account of political opinion. (at 1120). "When a powerful political leader uses his political office as a means to siphon public money for personal use, and uses political connections throughout a wide swath of government agencies, both to facilitate and to protect his illicit operations, exposure of his corruption is inherently political." (at 1121).

CAT/Internal Relocation, Not Affirmed, Bangladesh (2004). The IJ's finding that internal relocation was available was not accepted under *Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003). The burden of proving the reasonableness of internal relocation in the asylum context is on the government. However, "In the CAT context, unlike asylum, the petitioners have the burden of presenting evidence to show that internal relocation is not a possibility." (at 1123).

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- * *Hoque v. Ashcroft*, 367 F.3d 1190 (9th Cir. 2004) (b) (6); reversing adverse credibility determination and remanding to allow the government to attempt to rebut the presumption of future persecution, as past persecution was found; BEEZER.

Persecution/Physical Harm, Not Affirmed, Bangladesh (2004); Kidnaping; Threats, Not Affirmed, Bangladesh (2004); Prosecution, Not Affirmed, Bangladesh (2004). Member of the Bangladesh Nationalist Party (BNP) who took an active part in encouraging voting in the face of the opposition party's boycott was kidnaped, beaten, and threatened. Alien was accused of inciting violence when demonstrations by rival parties on the same day turned violent, and entered into hiding. His fear of prosecution based on the false charge is a fear of persecution based on his political opinion, as supported by the Country Report's statement that "the Awami League Government used the [Special Powers Act] primarily as a tool to harass and intimidate political opponents." (at 1197).

Nexus/Motive Found, Pre REAL ID, Bangladesh (2004). Denial of relief based upon finding that alien's fear was based on potential prosecution for criminal acts was not upheld because the court found that such would be politically motivated and thus constitute persecution. "Testimony that [alien] was popular and adept at recruiting members to the BNP, engendering the personal jealousy of Awami League members, does not detract from evidence that their motivation for harming him was political." (at 1198).

Credibility - Pre-REAL ID/Inconsistencies, Minor, Not Affirmed, Bangladesh (2004); Omissions, Not Affirmed, Bangladesh (2004); Corroboration Not Required, Bangladesh (2004); Discrepancy, Dates. Inconsistencies between certain documents, dates, and failure to bring up certain events during testimony, as well as the failure to produce additional corroborative evidence, were found not to justify an adverse credibility finding.

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- * *Khan v. INS*, 237 F.3d 1143 (9th Cir. 2001) (b) (6); remanding to allow alien to introduce excluded evidence; BROWNING, PREGERSON, and BEEZER. Petitioner claimed past persecution on account of his own political activities in a Dhaka University

student group, which included four arrests, seven-month confinement, and severe beatings. The IJ rejected his corroborating evidence for failure to authenticate it under 8 C.F.R. § 287.6(b).

Evidence/Authentication, Procedure. Documents may be authenticated through any recognized procedure under the regulations or the Federal Rules of Civil Procedure. Requiring foreign official records to be certified by a foreign service officer stationed in the country of origin, under 8 C.F.R. § 287.6(b), is not the exclusive method of authentication.

Belarus

Chronology

- ✖ *Rusak v. Holder*, 734 F.3d 894 (9th Cir. 2013)

✓ *Affirmed*

✖ *Not Affirmed*

- ✖ *Rusak v. Holder*, 734 F.3d 894 (9th Cir. 2013) (b) (6); reversing a denial of relief. Ms. Rusak is deaf and she and her family claimed to be Seventh Day Adventists (“SDA”). Her mother, who obtained status thru marriage, reported a series of violent acts directed against her and members of the family because of their religion. “Ms. Rusak herself claims to have suffered physical abuse and harassment as a child from her teachers and peers on account of her deafness and her family's religion.” Credibility was not at issue. KORMAN. There was a dissent by RAWLINSON.

Persecution/Deafness. The Circuit upheld the finding that the respondent had not established past persecution due to her deafness. “While her testimony establishes that she was treated badly by her teachers and classmates in school, her experiences did not rise to the level of persecution, which is ‘an extreme concept that does not include every sort of treatment our society regards as offensive.’” *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir.1995).

Persecution/Of Family, Affirmed, Bangladesh (2013). “While Ms. Rusak's own direct experiences in Belarus may not rise to the level of persecution on this ground as well, she is not required to demonstrate that she individually suffered persecution if she can establish a ‘pattern or practice . . . of persecution of groups of persons similarly situated’ and that she is a member of the group ‘such that [her] fear of persecution upon return is reasonable.’” *Kotas v. INS*, 31 F.3d 847, 853 n.8 (9th Cir. 1994). The similarly situated group may be the community of SDAs in Belarus or Ms. Rusak’s immediate family. *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999).

Past Persecution/Claims by Children. “Because Ms. Rusak was a child when the events underlying her asylum claim took place, the injuries suffered by her family members are directly relevant to her claim of past persecution . . . ‘injuries to a family must be considered in an asylum case where the events that form the basis of the past persecution claim were perceived when the petitioner was a child.’” *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1046 (9th Cir. 2007). This standard was applied, notwithstanding the fact that there was no “evidence directly linking the abuses suffered by her parents to her own psychological state.”

Past Persecution/Changed Conditions Not Found, Belarus (2013). “Contrary to the BIA's conclusion, the Belarus country reports contained in the Administrative Record do not indicate that the status of minority religious groups has improved in recent years. In fact, they suggest the opposite – that members of minority religions still face attack by the government. The BIA's

conclusion on this issue is unsupported by substantial evidence.” The dissent had argued that “Seventh Day Adventists are not currently persecuted in Belarus.”

Religion/Seventh Day Adventist. The dissent noted that respondent testified that “she attends [Seventh Day Adventist] services regularly with her mother,” but “never testified that she was a member of the Seventh Day Adventist denomination or that attendance is all that is required to establish membership.” The dissent further notes that “The Official Site of the Seventh-day Adventists . . . require[es] baptism to be received as a member.”

Bosnia-Herzegovina

Chronology

- ✱ *Knezevic v. Ashcroft*, 367 F.3d 1206 (9th Cir. 2004)
- ✱ *Vukmirovic v. Ashcroft*, 362 F.3d 1247 (9th Cir. 2004)

✓ *Affirmed*

✱ *Not Affirmed*

- ✱ *Knezevic v. Ashcroft*, 367 F.3d 1206 (9th Cir. 2004); remanding to determine the reasonableness of internal relocation and to reconsider asylum and withholding of removal. Aliens fled from a general attack by Croat forces against the Serb residents in their area and were found to have established past persecution and a well-founded fear of future persecution. Croat forces who bombed and invaded a Serbian area were motivated by ethnic hatred. Petitioners fled when they realized the threat of harm was imminent. Bombings destroyed their restaurant and home, and Croats stole all their personal property. BEA.

Well-Founded Fear/Pattern or Practice, Not Affirmed, Bosnia-Herzegovina (2004). The Croat pattern and practice of ethnically cleansing all Serbs in the region negates the need to prove individual targeting to establish a well-founded fear or future persecution. (at 1213). “While proof of particularized persecution is sometimes required to establish a well-founded fear of future persecution, such proof of particularized persecution is not required to establish past persecution. See 8 C.F.R. § 1208.13(b)(1) (not mentioning any such requirement for past persecution); 8 C.F.R. § 1208.13(b)(2)(i)(C)(iii)(A) (proof of particularized persecution to establish a well-founded fear not required only where the applicant proves a pattern or practice of persecution of a protected group to which the applicant belongs); *Kotaz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994) ([Hungarian granted relief on basis of antipathy to gypsies]).” (at 1211). “Moreover, the Knezeviks need not demonstrate that they will be ‘singled out’ for persecution . . . because they proved a practice of persecution against Serbs in the region.” (at 1213).

Persecution/Ethnic Cleansing. There is a “critical distinction between persons displaced by the inevitable ravages of war (e.g., the bombing of London by the German Luftwaffe during World War II), and those fleeing from hostile forces motivated by a desire to kill each and every member of that group (e.g., the destruction of the Jewish neighborhoods on the Eastern front of Europe by the Einsatzgruppen, who followed the German Wehrmacht in WWII). In the first example, although the German armed forces intended to conquer and occupy London, they did not intend to kill every Londoner. In the latter example, the Nazi detachments did intend to kill every Jew, which made the persecution individual to each Jewish resident of an area invaded by

the Nazis. The latter is persecution ‘on account of’ a protected status, while the former is not.” (at 1211-12).

Changed Country Conditions/Internal Relocation Not Possible, Bosnia-Herzegovina (2004); Changed Conditions Not Found, Bosnia-Herzegovina (2004). Although it may be safe for petitioners to relocate to the Serb-held parts of Bosnia-Herzegovina, relocation is unreasonable based on their age (75 and 66), the great difficulty in finding employment, the destruction of their business and loss of all their possessions, and the fact their family members no longer reside in the country.

Well-Founded Fear/Ten Percent Rule, Not Affirmed, Bosnia-Herzegovina (2004). “Even a ten percent chance that the applicant will be persecuted in the future is enough to establish a well-founded fear. *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001).” (at 1212-13).

- ✱ *Vukmirovic v. Ashcroft*, 362 F.3d 1247 (9th Cir. 2004); remanding after finding petitioner was not a persecutor. Bosnian Serb did not become a “persecutor” by using force to defend his hometown against invading Croats. Although some of the skirmishes resulted in deaths and petitioner admitted breaking the noses and foreheads of Croats, he did not participate in the ethnic cleansing campaign launched by the Bosnian Serbs against the Muslims. “Vukmirovic admitted to physically harming the attacking Croats, beating them with sticks and pistols. He admitted to breaking the ‘nose and foreheads’ of Croats during the fights.” (at 1248). THOMAS.¹

Bars to Asylum/Persecutor Bar, Not Found, Bosnia-Herzegovina (2004). “Mere acquiescence or membership in an organization is insufficient to trigger the deportability provision . . . [A]ctive personal involvement in persecutorial acts needs to be demonstrated before deportability may be established.” 362 F.3d at 1252 (citing *Laipenieks v. INS*, 750 F.2d 1427, 1431 (9th Cir. 1985)). Persecutor status is not established by mere membership in an ethnic category or group that has a pattern of persecution of others. A finding that the alien “ordered, incited, assisted or otherwise participated in the persecution of any person,” must be based on “‘a particularized evaluation in order to determine whether an individual’s behavior was culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution.’” *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir. 2001). Without such an individualized assessment, qualified asylum applicants could be denied relief purely on grounds that the immigration statutes were designed to avoid – bias based on ethnicity or national origin.” (at 1252).

Nexus/Motive Not Found, Pre REAL ID, Bosnia-Herzegovina (2004). Self-defense does not qualify as persecution of others, since such would not be “on account of” one of the protected grounds; active personal involvement in persecutorial acts needs to be demonstrated. “In this case, there was no affirmative evidence in the record showing that Vukmirovic had participated

¹ On remand to the IJ, the respondent failed to appear and an *in absentia* order was entered. A motion to reopen was denied. The court initially reversed a denial of the motion to reopen. The government’s petition for rehearing en banc was denied, but the panel granted rehearing of its decision published at 621 F.3d. 1043 (9th Cir. 2010). Upon such, it is now affirmed. “The petitioner did not know about his removal hearing because he had moved from his previous address and had failed to advise his new lawyer and the immigration court about his whereabouts.” The circuit found that “petitioner did not demonstrate the diligence necessary for a finding of exceptional circumstances” to justify the non-appearance. 640 F.3d 977 (9th Cir. 2011).

in physical attacks other than in the context of self-defense,” and the court rejected “ambiguous” statements to the contrary. (at 1252-53).

Bulgaria

Chronology

- ✓ *Angov v. Lynch*, 788 F.3d 893 (9th Cir. 2015)
- ✓ *Donchev v. Mukasey*, 553 F.3d 1206 (9th Cir. 2009)
- ✗ *Mihalev v. Ashcroft*, 388 F.3d 722 (9th Cir. 2004)
- ✗ *Popova v. INS*, 273 F.3d 1251 (9th Cir. 2001)
- ✗ *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999)
- ✗ *Stoyanov v. INS*, 172 F.3d 731 (9th Cir. 1999)
- ✗ *Stoyanov v. INS*, 149 F.3d 1226 (9th Cir. 1998)

✓ Affirmed

- ✓ *Angov v. Lynch*, 788 F.3d 893 (9th Cir. 2015) (b) (6); amended decision upholding a denial of relief on credibility grounds involving a claim by a Roma, denying a petition for rehearing, and denying a petition for rehearing en banc. The key issue in the case was the IJ's reliance on an investigative report by the State Department in making an adverse credibility determination. The investigative report had been provided to the respondent in advance of the hearing and he had the opportunity to submit a "plethora of rebuttal evidence." *Id.* at 897. Further, "in response to Angov's objection, the government attorney asked the State Department to produce an employee to testify about the investigation." *Id.* The DHS submitted an additional State Department letter which "provided some general background information . . . but explained that it [is the State Department's] policy to refrain from providing further specific information about an overseas investigation." *Id.* Judge Kozinski offered a thorough rationale for admitting the report in light of the fact that the Second Circuit reached a contrary conclusion, *id.* at 900, and recognized that four other circuit courts have held that admitting such investigative reports violates an asylum applicant's procedural due process rights. *Id.* at 898, n.3. The Circuit found that "neither the statute nor the regulations give the asylum applicant a right to a particular quality of the evidence presented against him. Instead, he is given the right to have an impartial adjudicator assess the evidence." *Id.* at 900 (emphasis omitted). Judge Kozinski spent a substantial portion of the opinion discussing the risks of fraudulent asylum claims: "The schizophrenic way we administer our immigration laws creates an environment where lying and forgery are difficult to prove, richly rewarded if successful, and rarely punished if unsuccessful." *Id.* at 901. Further, "[f]raud, forgery, and fabrication are so common—and so difficult to prove—that they are routinely tolerated." *Id.* Further exacerbating the problem, "[t]he United States gets close to 74,000 asylum cases a year, far more than any other industrialized nation." *Id.* at 907. The Circuit reasoned that "cabining the range of permissible documents [however imperfect] on which a trier of fact can rely in making his decision" would "subvert the asylum process, giving charlatans a free pass into the United States." *See id.* at 905, 907. KOZINKI (dissent by THOMAS).

Due Process/State Department Reports, Reliance On, Bulgaria (2015). The Circuit held that the “IJ acted within his discretion when he admitted the [report] into evidence and relied on it to find that the subpoenas Angov submitted were fraudulent,” notwithstanding the dissent’s issue with the report’s reliance on “multiple layers of unauthenticated hearsay, without affording the petitioner some right of confronting the charges.” *Id.* at 910; *id.* at 911 (Thomas, C.J., dissenting). The Circuit reasoned that there is “nothing unfair about having a U.S. government agent check out some of [the applicant’s] basic facts and inform the IJ of possible discrepancies” as, in most cases, the applicant can “obtain further evidence supporting the challenged claims.” *Id.* at 904. Moreover, the holding does not mandate an adverse credibility finding in cases where such reports are submitted; rather, the Circuit “simply disclaim[s] the conclusion that [the reports] must be excluded from an immigration judge’s consideration when they fail to provide sufficient identifying detail.” *Id.* at 902. By contrast, the dissent “would join the Second Circuit,” which resolved the case on statutory rather than constitutional grounds, to hold that “[u]nsworn, unauthenticated hearsay letters—prepared for litigation by the government and not subject to any form of cross-examination—cannot form the sole basis for denying asylum to an otherwise qualified applicant.” *Id.* at 911 (Thomas, C.J., dissenting).

- ✓ ***Donchev v. Mukasey*, 553 F.3d 1206 (9th Cir. 2009)** (b) (6); affirming a denial of relief to an ethnic Bulgarian who based his claim on having been “persecuted” for being a member of a particular social group deemed as “friend of Roma.” There were claims that the lead respondent had been raped as well as subjected to repeated acts of physical violence by both the Bulgarian police and “skinheads.” Other family members continued to live in peace in Bulgaria. The decision contains a lengthy discussion of the case law pertaining to relief based on claims of membership in a particular social group. Respondent was found to have been credible. KLEINFELD; dissent, B. FLETCHER.

Nexus/Motive Not Found, Pre REAL ID, Bulgaria (2009); Central Reason, Pre REAL ID, Bulgaria (2009); Persecution/Random Attack, Bulgaria (2009). “Although the skinheads assaulted, beat, and robbed Donchev after he left a Friends of the Roma meeting, the IJ found that there was no evidence that it was “on account of” his friendships with the Roma or membership in Friends of Roma. The skinheads who took Donchev’s watch and money were not policemen. The Court found that these facts support the IJ’s finding that this was a crime, not persecution. The timing and location of the attacks (outside the Roma’s organization meeting) alone do not compel the conclusion that Donchev was attacked because of a protected ground.”

Particular Social Group/Social Visibility. The majority emphasized the need for respondent to show an identifiable ethnic group and distinguished *Mihalev v. Ashcroft*, 388 F.3d 722 (9th Cir. 2004) on the primary ground that Donchev, unlike Mihalev, was ethnically Bulgarian and not Roma. The majority found that Donchev’s asserted group did not have the requisite degree of “social visibility.” Members of a particular social group must ordinarily be expected not to “have chosen a course of conduct that led others to harm them.” The Court rejected the notion that “supporters of an ethnic, political, or religious group are themselves a particular social group, citing to *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008) and *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005). The Court emphasized the principle from *Ochoa* that “the key to establishing a ‘PSG’ is ensure that the group is narrowly defined.”

✖ Not Affirmed

- ✖ *Mihalev v. Ashcroft*, 388 F.3d 722 (9th Cir. 2004) ((b) (6)); remanding upon finding alien suffered persecution in Bulgaria. Roma (Gypsy) alien was arrested (1) for hosting a birthday party at his apartment, jailed for 10 days, beaten with sandbags each day, and forced to do heavy labor; (2) for failure to carry his id, accused of robbery, and again beaten and forced to work for two weeks; and (3) during a periodic check-in at the police station, beaten and sexually assaulted by police guard at the forced-labor site. IJ ruled alien failed to establish persecution was on account of his Gypsy ethnicity, citing the Country Report for the proposition that all criminal suspects are mistreated. While the second and third arrests may have been void of any nexus to his ethnicity, the first arrest included statements from the police officers that alien was instigating gypsy gatherings. GRABER; (KOZINSKI, dissent: Disparaging remarks made by the officers while arresting alien at the party does not lead to the conclusion that the beatings which occurred *after* the arrest were on account of his ethnicity. Derogatory comments may be sufficient to establish motive for persecution only when they are made in the course of persecuting the alien).

Persecution/Generalized Violence, Bulgaria (2004). A “significant risk” of abuse prevalent throughout a country does not mean it is “a certainty that erases any possible connection between abuse and a protected ground.... Moreover, there is no requirement of having been abused more than someone else.... Asylum seekers who have fled from generally repressive regimes have no higher a burden than those who have fled from generally benign countries.” (at 730).

Nexus/Motive Found, Pre REAL ID, Bulgaria (2004); Ethnicity/Not Affirmed, Bulgaria (2004). Even though the police came to the residence after a report of excessive noise, it was found that ethnic slurs established the required nexus.

- ✖ *Popova v. INS*, 273 F.3d 1251 (9th Cir. 2001) ((b) (6)); granting withholding and remanding after reversing BIA’s “on account of” finding; (1) alien demonstrated well-founded fear of future persecution “on account of” her religion and political opinion; (2) INS failed to rebut the presumption of future persecution afforded alien on account of her past persecution; and (3) alien was entitled to withholding of deportation on basis that her life and freedom were threatened; PREGERSON.

Religion/Under Communism; Political Opinion/Found, Bulgaria (2001). Alien demonstrated well-founded fear of future persecution “on account of” her religion and political opinion, making her eligible for a discretionary grant of asylum; although alien received education and employment from her government, because of the religious connotation associated with her name and her adherence thereto, as well as her political opinions, her family suffered persecution in her youth, her education was conditioned upon her participation in a re-education process, she was harassed by supervisors and fellow employees, she was threatened by police officers, she was fired from her first job, and her salary was cut at her second job.

Past Persecution/Changed Conditions Not Found, Bulgaria (2001); Individualized Analysis, Bulgaria (2001); Failure to Rebut, Bulgaria (2001). INS failed to rebut the presumption of future persecution afforded alien on account of her past persecution; although INS produced evidence illustrating that conditions in foreign country improved as general matter, it introduced no evidence to meet its burden of showing that there had been a change in conditions that would affect alien on an individual level.

Persecution/Threats Alone, Not Affirmed, Bulgaria (2001); Physical Harm Not Necessary, Bulgaria (2001). Alien was entitled to withholding of deportation on basis that her life and freedom were threatened, although INS asserted that conditions in foreign country had changed; while she was in foreign country, police put a gun to alien's head and repeatedly threatened her with prison and anonymous callers threatened her life and freedom, and two years after she had left foreign country for United States police were looking for alien and her colleagues continued to suffer persecution. This was done without a showing of physical violence to the alien.

Withholding of Deportation/Granted, Bulgaria (2001). "Popova's life and liberty were repeatedly threatened while she lived in Bulgaria. The police put a gun to Popova's head and repeatedly threatened her with prison, and anonymous callers threatened her life and freedom. Police were looking for Popova two years after she had left Bulgaria for the United States. Based upon this undisputed evidence, it must be presumed that her life and freedom would be threatened should Popova return to Bulgaria. The evidence submitted by the INS is insufficient to rebut this presumption. Indeed, the 1992 Country Report describes the continued persecution of the leader of Podcrepa, and threats by the government to imprison him for his past activities. Accordingly, we conclude that Popova is entitled to a withholding of deportation." (at 1261).

* *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999) (b) (6); affirming BIA's denial of alien's motion to reopen asylum and withholding claims and remanding to adjudicate adjustment of status application and wave procedural defect; (1) BIA did not abuse its discretion in upholding decision not to allow reopening, but (2) BIA abused its discretion in denying motion to remand on basis of aliens' failure to include completed application for permanent residence with motion; B. FLETCHER.

Motion to Reopen/Changed Circumstances, Not Affirmed, Bulgaria (1999). BIA did not abuse its discretion in upholding decision of IJ not to allow reopening of asylum application of alien who had originally sought asylum based on alleged persecution of her husband in Bulgaria for anti-Communist views, had withdrawn application based on improved country conditions, and then had sought to reopen following tensions between communists and their opponents in Bulgaria; BIA offered reasonable explanation for its decision in stating she failed to demonstrate objective basis for fear that she would be personally persecuted.

Motion to Remand/Unopposed. BIA abused its discretion in denying alien's motion to remand deportation proceedings to allow her to pursue adjustment of status on basis of newly approved visa petition, on basis of her failure to include completed application for permanent residence with motion when INS did not oppose the motion.

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- ✱ *Stoyanov v. INS*, 172 F.3d 731 (9th Cir. 1999) (b) (6)); remanding to allow alien a reasonable opportunity to explain perceived inconsistencies; (1) BIA violated alien's due process rights by making adverse credibility finding without notice, and (2) BIA failed to set forth alternative basis for denial of asylum that would warrant affirmance of denial of asylum despite due process violation; B.FLETCHER.

Credibility/Inconsistencies, No Attempt to Enhance Claim. Where asylum petitioner initially gives one account of persecution but then revises his or her story so as to lessen the degree of persecution he or she experienced, rather than to increase it, the discrepancy generally does not support an adverse credibility finding.

Credibility/Opportunity to Explain. "Here, the BIA made an adverse credibility finding without affording Stoyanov any opportunity to explain the supposed inconsistencies in his written and oral testimony. Under *Campos-Sanchez*, if the adverse credibility finding 'form[ed] the basis of [the BIA's] denial of asylum,' 164 F.3d at 450, then we must vacate the denial and remand to allow Stoyanov a reasonable opportunity to explain those inconsistencies." (at 735).

- ✱ *Stoyanov v. INS*, 149 F.3d 1226 (9th Cir. 1998) (b) (6)); Remand for reconsideration based on finding that State Department report contained an erroneous statement that affected the BIA's decision to deny asylum; TROTT.

Country Reports/Erroneous Statement Therein. State Department report's erroneous statement that alien obtained his passport before Bulgarian parliament passed law freeing up passport issuance affected decision of BIA to deny alien's petition for asylum, warranting remand for reconsideration; BIA relied on report in concluding that alien obtained unusual privilege not available to persons in trouble with the authorities as he had claimed to be.

Burma/Myanmar

Chronology

- ✖ *She v. Holder*, 629 F.3d 958 (9th Cir. 2010)
- ✖ *Khup v. Ashcroft*, 376 F.3d 898 (9th Cir. 2004)

✓ *Affirmed*

✖ *Not Affirmed*

- ✖ *She v. Holder*, 629 F.3d 958 (9th Cir. 2010) (b) (6); reversing a denial of relief where the Board found respondent ineligible for asylum as a matter of law for having been firmly resettled in Taiwan. Respondent was born in Burma but had fled to Taiwan where she became a citizen, had obtained a passport and had periodically renewed it. Respondent came to the United States and sought asylum and related relief. Without an evidentiary hearing, the IJ designated Burma, Taiwan, and China as “countries of removal.”² The IJ denied her application stating that her claim of asylum as to Burma was moot, since she could safely return to Taiwan. The BIA affirmed the IJ’s decision stating that the respondent was ineligible for asylum because she had been firmly resettled in Taiwan. HOGAN.

Bars to Asylum/Firm Resettlement, Not Found, Burma/Myanmar (2010). Under 8 C.F.R. 208.15, “an alien is considered to be firmly resettled if, prior to arrival in the United States . . . she entered into another country . . . [and] while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement . . .” However, the circuit recognized that under 208.15(a), “the definition of firm resettlement does not encompass an alien who can demonstrate that ‘her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country.’” (at 962 (quoting 8 C.F.R. § 208.15(a))). The circuit found that inadequate consideration was given to respondent’s claim that she qualified under this exception. The circuit explained that “Neither the IJ nor the BIA explained why She fell short of carrying her burden of showing

² The question of designation of a country of removal was presented in the unpublished decision of *Zabadi v. Holder*, 407 F. App’x 219 (9th Cir. 2010). The Board had stated: “nothing . . . forbids the DHS from acting on its own authority to designate a country” The circuit refused to evaluate the argument that such was impermissible because the respondent’s risk of actual removal to such a country was unripe, stating that it “rests upon contingent future events that may not occur as anticipated, or indeed may occur not at all.” (citing to *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009) and *She*, *Id.*

that she meets an exception to the definition. Taking her testimony as credible, She may be able to carry that burden.” (at 964). This was so notwithstanding the fact that “She remained in Taiwan longer than the one year necessary to obtain a passport and arrange onward travel . . . [and] was recognized as a national of Taiwan and was granted the protection of that country for two decades.” (at 963).

Withholding/Designation of Country. The circuit recognized that “Under the plain wording of 8 C.F.R. § 1208.16, an applicant is not entitled to adjudication of an application for withholding of removal to a country that nobody is trying to send them to. Here, the proposed country of removal is Taiwan, not Burma, despite the IJ’s designation of both nations.” (at 964). The circuit found that any risk of obligatory return to Burma was unripe and hence, it declined to consider the respondent’s withholding of removal claim. It further noted that “firm resettlement does not preclude eligibility for withholding of removal.” (at 962 (citing *Siong v. INS*, 376 F.3d 1030, 1040-41 (9th Cir. 2004))).

- * *Khup v. Ashcroft*, 376 F.3d 898 (9th Cir. 2004) (b) (6); remanding after finding past persecution and at least a 51% chance of torture; Alien had obtained a bona fide passport from his government and made no claim that family members had been mistreated, nor did he apply for asylum in countries in which he lived and traveled before coming to the U.S.; TASHIMA.

Persecution/Of Friends or Affiliates, Burma (2004). Seventh Day Adventist minister suffered past persecution when a fellow minister, who was with him when the military warned them not to preach any more, was arrested, tortured and killed, then dragged through the streets as an example to others; the military was also looking for the alien, who was forced into hiding. The finding was heavily influenced by documentary materials supporting the objective component of the claim.

Persecution/Not Rising to Level Of, Burma (2004). Minister’s one day of forced portage did not rise to the level of persecution because he did not suffer any ill effects and gave no indication he had been seriously abused. Although alien was made to perform hard labor in unpleasant circumstances, his main reaction was a feeling of injustice at having been made to work on the Sabbath. (at 903).

Cambodia

Chronology

- ✓ *Kin v. Holder*, 595 F.3d 1050 (9th Cir. 2010)
- ✗ *Im v. Gonzales*, 497 F.3d 990 (9th Cir. 2007), *withdrawn*, 522 F.3d 966 (9th Cir. 2008)
- ✓ *Cheo v. INS*, 162 F.3d 1227 (9th Cir. 1998)

✓ *Affirmed*

- ✓ *Kin v. Holder*, 595 F.3d 1050 (9th Cir. 2010) (b) (6); affirming a denial of relief over an adverse credibility finding. This case applied pre-REAL ID Act case law. The respondent had claimed significant physical violence inflicted because of his political opinion by the Sam Rainsy party. The adverse credibility determination was based primarily on inconsistencies between the claim as presented at hearing and that set forth in the I-589 as well as testimonial inconsistencies between different witness testimony. TALLMAN.

Credibility - Pre-REAL ID/Omissions, Affirmed, Cambodia (2010). The court found “significant” the omission from the I-589 of the “key political demonstration they later claimed was the basis for their arrests and subsequent persecution. . . . When confronted with the omission from the asylum hearing, Kin stated that he felt inclusion in the asylum applications was not necessary because the demonstration would be discussed at the hearing.” The circuit rejected this justification.

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, Cambodia (2010). “It is not improper for the BIA to consider such inconsistencies when making credibility determinations . . . the finder of fact shoulders the responsibility of examining all of the evidence presented and deciding which version of the events is true.”

- ✓ *Cheo v. INS*, 162 F.3d 1227 (9th Cir. 1998) (b) (6); upholding IJ’s denial; aliens sought asylum because armed groups tried to recruit them, they were threatened and one was beaten; KLEINFELD. *Distinguished by Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814 (9th Cir. 2004); *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. Jan. 19, 2005).

Bars to Asylum/Firm Resettlement, Found, Cambodia (1998). A three-year undisturbed stay in Malaysia was a sufficient basis for the IJ to presume that firm resettlement may apply. “A duration of residence in a third country sufficient to support an inference of permanent resettlement in the absence of evidence to the contrary shifts the burden of proving absence of firm resettlement to the applicant.” (at 1229).

Persecution/Not Rising to Level Of, Cambodia (1998); Nexus/Motive Not Found, Pre REAL ID, Cambodia (1998); Ethnicity/Affirmed, Cambodia (1998). Ethnic Chinese brothers who were

smuggled out of Cambodia to avoid military recruitment, beatings and extortion, were discriminated against based on their Chinese ethnicity, but such discrimination did not rise to the level of persecution, and the military recruitment was not motivated by an animus against any group.

✖ *Not Affirmed*

- ✖ *Im v. Gonzales*, 497 F.3d 990 (9th Cir. 2007), *withdrawn*, 522 F.3d 966 (9th Cir. 2008) (A79-267-088); reversing and remanding a denial of asylum based on the persecutor bar; B. FLETCHER.

China

Chronology

- ✗ *Yang v. Lynch*, 815 F.3d 1173 (9th Cir. 2016)
- ✗ *Lai v. Holder*, 773 F.3d 966 (9th Cir. 2014)
- ✓ *Lianhua Jiang v. Holder*, 754 F.3d 733 (9th Cir. 2014)
- ✗ *Ai Jun Zhi v. Holder*, 751 F.3d 1088 (9th Cir. 2014)
- ✓ *He v. Holder*, 749 F.3d 792 (9th Cir. 2014)
- ✓ *Jin v. Holder*, 748 F.3d 959 (9th Cir. 2014)
- ✓ *Huang v. Holder*, 744 F.3d 1149 (9th Cir. 2014)
- ✓ *Li v. Holder*, 738 F.3d 1160 (9th Cir. 2013)
- ✗ *Zhao v. Holder*, 728 F.3d 1144 (9th Cir. 2013)
- ✓ *Cui v. Holder*, 712 F.3d 1332 (9th Cir. 2013)
- ✓ *Li v. Holder*, 656 F.3d 898 (9th Cir. 2011)
- ✓ *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011)
- ✗ *Hu v. Holder*, 652 F.3d 1011 (9th Cir. 2011)
- ✓ *Zheng v. Holder*, 644 F.3d 829 (9th Cir. 2011)
- ✗ *Liu v. Holder*, 640 F.3d 918 (9th Cir. 2011)
- ✗ *Li v. Holder*, 629 F.3d 1154 (9th Cir. 2011)
- ✓ *Lin v. Holder*, 610 F.3d 1093 (9th Cir. 2010)
- ✗ *Jiang v. Holder*, 611 F.3d 1086 (9th Cir. 2010)
- ✗ *Lin v. Holder*, 588 F.3d 981 (9th Cir. 2009)
- ✗ *Li v. Holder*, 559 F.3d 1096 (9th Cir. 2009)
- ✗ *Zhao v. Mukasey*, 540 F.3d 1027 (9th Cir. 2008)
- ✗ *Zhu v. Mukasey*, 537 F.3d 1034 (9th Cir. 2008)
- ✗ *Chen v. Mukasey*, 527 F.3d 935 (9th Cir. 2008)
- ✓ *Chen v. Mukasey*, 524 F.3d 1028 (9th Cir. 2008)
- ✗ *Huang v. Mukasey*, 520 F.3d 1006 (9th Cir. 2008)
- ✓ *He v. Gonzales*, 501 F.3d 1128 (9th Cir. 2007)
- ✗ *Tang v. Gonzales*, 489 F.3d 987 (9th Cir. 2007)
- ✗ *Lin v. Gonzales*, 472 F.3d 1131 (9th Cir. 2007)
- ✗ *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007)
- ✓ *Gu v. Gonzales*, 454 F.3d 1014 (9th Cir. 2006)
- ✗ *Lin v. Gonzales*, 434 F.3d 1158 (9th Cir. 2006)
- ✗ *Zhou v. Gonzales*, 437 F.3d 860 (9th Cir. 2006)
- ✗ *Quan v. Gonzales*, 428 F.3d 997 (9th Cir. 2005)
- ✗ *Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005)
- ✗ *Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. 2005)
- ✗ *Zheng v. Ashcroft*, 397 F.3d 1139 (9th Cir. 2005)
- ✓ *Huang v. Ashcroft*, 390 F.3d 1118 (9th Cir. 2005)
- ✗ *Zhang v. Ashcroft*, 388 F.3d 713 (9th Cir. 2004)

- ✖ *Ding v. Ashcroft*, 387 F.3d 1131 (9th Cir. 2004)
- ✓ *Li v. Ashcroft*, 378 F.3d 959 (9th Cir. 2004)
- ✖ *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004)
- ✖ *Ge v. Ashcroft*, 367 F.3d 1121 (9th Cir. 2004)
- ✖ *Chen v. Ashcroft*, 362 F.3d 611 (9th Cir. 2004)
- ✖ *Guo v. Ashcroft*, 361 F.3d 1194 (9th Cir. 2004)
- ✖ *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004)
- ✖ *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004)
- ✓ *Wang v. INS*, 352 F.3d 1250 (9th Cir. 2003)
- ✖ *Wang v. Ashcroft*, 341 F.3d 1015 (9th Cir. 2003)
- ✖ *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003)
- ✖ *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003)
- ✓ *Li v. INS*, 92 F.3d 985 (9th Cir. 1996)

✓ **Affirmed**

- ✓ *Lianhua Jiang v. Holder*, 754 F.3d 733 (9th Cir. 2014) ((b) (6)); upholding an adverse credibility finding denying relief. Respondent was of ethnic Korean descent. She claims to have attended an unofficial “house” Christian Church and suffered significant mistreatment. There were significant inconsistencies. “Petitioner was asked four times whether anything else happened during her detention, other than being forced to read the government newspaper. Each of the four times, Petitioner failed to mention the physical abuse that she expressly described in her asylum declaration.” 754 F.3d at 736. NAVARRO (District Court Judge sitting by designation). There was dissent by BEA who would have found her to be credible as she had given reasonable explanations for such.

Credibility - Post-REAL ID/China (2014). The court applied *Shrestha v. Holder*, 590 F.3d 1034, 1039 (9th Cir. 2010), as setting forth the pertinent standard to be applied. The dissent felt that the IJ’s adverse credibility determination was based upon her “misunderstanding of petitioner’s attorney’s non-chronological questions and of the plain words of petitioner’s answers.” *Id.* at 742 (Bybee, J., dissenting). The majority disagreed concluding that under a “deferential” standard of review, the finding was permissible and to hold otherwise would result in “de novo” review. *Id.* at 740 (majority opinion).

CAT/Same Evidence. “Because Petitioner’s CAT claim is based on the same testimony found to be not credible, and she points to no other evidence that the IJ should have considered, substantial evidence supports the denial of CAT relief.” *Id.* at 741.

Due Process/IJ Bias, Not Found, China (2014). “Because Petitioner has failed to show that the IJ prevented her from presenting evidence and because Petitioner has failed to articulate how this alleged deprivation prejudiced her, her due process challenge must fail.” *Id.* at 741. Questions and comments had been made about the respondent’s living arrangements with a male. The court cited to *United States v. Dring*, 930 F.3d 687, 691 (9th Cir. 1991) (“It would be permissible to

imply that because of *bias* due to *family relationship*, a father is lying to protect his son.” (emphasis in original)).

- ✓ *He v. Holder*, 749 F.3d 792 (9th Cir. 2014) (b) (6)); upholding a denial of relief. Respondent’s wife had been sterilized and had been obligated to have had an abortion after having again become pregnant and given birth to two children. He further asserted that he had been fined for the “extra birth,” fled when he could not pay the full extent of the fine, and left China for fear that he would be persecuted for that reason if he returned. Credibility was not at issue. Under *Matter of J-S-*, 24 I&N Dec. 520 (Att’y Gen. 2008): “He had not described any resistance to China’s family planning practices in his own right [H]is fine did not constitute economic persecution, he had avoided harm for over eleven years after it was assessed, and his wife and two children had remained in China unharmed during the intervening period.” 749 F.3d at 795. CLIFTON

Persecution/Other Resistance to CPC. “Because He’s actions are a ‘grudging compliance’ rather than a ‘failure or refusal to comply’ they do not constitute resistance.” *Id.* at 796 (quoting *Matter of M-F-W-*, 24 I&N Dec. 633, 637-38 (BIA 2008)).

Persecution/Economic, Not Found, China (2014). “He has not shown any evidence of the effect of the fine on him, apart from that he went into hiding to avoid paying it, and he was able to borrow a much larger sum to travel to the United States.” *Id.* at 796 (citing with approval *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004)).

- ✓ *Jin v. Holder*, 748 F.3d 959 (9th Cir. 2014) (b) (6)); affirming a denial on an adverse credibility determination. This is a REAL ID Act case. Respondent based his claim on participation in an unauthorized Christian “house” church, which led to his being detained and beaten. GOULD

Credibility – Post-REAL ID/Adverse Finding, Upheld, China (2014). The adverse credibility determination was upheld based on “‘non-responsive demeanor,’ his misrepresentations of his residence, his fraudulent church membership certification, and his lack of detail in his testimony on the alleged police incident in China.” 748 F.3d at 965. “There are many instances where . . . Jin’s answers were non-responsive . . . [and] Jin evaded questions.” *Id.* The court cited *Shrestha v. Holder*, 590 F.3d 1034, 1045 (9th Cir. 2010): “[T]he record’s demonstration that Shrestha’s unresponsiveness was a pattern throughout the hearing is one of the circumstances that the REAL ID Act entitles the agency to consider in assessing Shrestha’s credibility.” *Id.* “Jin’s persistent misrepresentations to the immigration courts . . . are significant because they were made in an attempt to gain a better forum for Jin’s application [H]e admitted that he submitted phony addresses in those locations to gain a better forum.” *Id.* “Jin’s testimony revealed that he had only attended the church in Las Vegas for the past couple of months, not the two years specified in the certification. Jin eventually admitted that he begged his pastor to help him, prompting the fraudulent certification many months before his immigration court hearing.” *Id.* at 966. With regard to “lack of detail,” in comparison to the assertion in the

declaration that “police ‘broke into’ the family church” [as compared to asserting that] someone in the home church opened the door for the police.” *Id.* at 966-67.

- ✓ ***Huang v. Holder*, 744 F.3d 1149 (9th Cir. 2014)** ((b) (6)); upholding a denial of relief. Respondent asserted that she had been persecuted because of her participation in a Chinese “house church” wherein she engaged in the unauthorized practice of Christianity. She was denied relief on the basis of a finding that she was not credible. This is a REAL ID Act case. The court discussed how such should be applied with regard to evaluation of credibility. IKUTA

Credibility - Post-REAL ID/Demeanor, China (2014). The IJ had noted that respondent “paused frequently while testifying ‘as if to assess the impact of the answer she provided.’” 744 F.3d at 1151. The court found: “This documentation of Huang’s non-responsive hesitations is sufficient . . . which in turn sustains the IJ’s adverse credibility determination.” *Id.* at 1155. The court cited to *Shrestha v. Holder*, 590 F.3d 1034 (9th Cir. 2010), as permitting reliance on the IJ’s determination that Respondent’s testimony had been “extremely superficial” and how it “could have easily been memorized.” *Id.* at 1040. The decision notes: “The IJ not only considered Huang’s demeanor, but also indicated that Huang’s testimony was not persuasive or sufficiently specific to carry her burden of proof.” 744 F.3d at 1155.

Credibility - Post-REAL ID/Corroboration, Required, China (2014). “The IJ noted that Huang’s testimony was not support by reasonably obtainable corroborating evidence Despite being represented by counsel and acknowledging that her lawyer told her how to prepare for her case, Huang did not provide documentary evidence supporting her claim that she was a practicing Christian other than her photographs [a claimed ‘baptismal ceremony’] and bail bond receipt . . . for the crime of ‘violating the management of public order with a mob.” 744 F.3d at 1155. Further, “Huang did not produce a baptismal certificate or any other evidence corroborating her church attendance in either the U.S. or China. *Id.* at 1151.

- ✓ ***Li v. Holder*, 738 F.3d 1160 (9th Cir. 2013)** ((b) (6)); upholding an adverse credibility finding and denying relief. Respondent claimed persecution on the basis of her religion and having a forced abortion. There had been inconsistencies in terms of when she had obtained her passport to have left China and her time of attendance at a Chinese “house” Christian church. The decision upholds the applicability of the doctrine “*falsus in uno, falsus in omnibus*—false in one thing, false in everything.” This was a pre-REAL ID Act case. BEA. (CHRISTEN, J.).

Credibility/Inconsistencies, Material, Affirmed, China (2013). In finding the misrepresentations to be “material,” “inconsistencies regarding how long she was involved in her home church and when and why she applied for a passport are central to determining whether she suffered religious persecution. While these inconsistencies concern material aspects of her religious persecution claim for asylum, they do not touch upon her forced abortion claim—religious persecution or forced abortion. Her credibility goes to the heart of either and both claims. To hold otherwise would be to encourage asylum seekers to make as many claims

for asylum as possible, in the hopes that as to one, the IJ did not find any inconsistency that went to the “heart of the matter.” Thus, an asylum seeker who lied through three of his claims, but manages to recite a fourth uncontradicted, would skirt an adverse credibility finding as to the fourth. This result is not and cannot be the law.”

- ✓ *Cui v. Holder*, 712 F.3d 1332 (9th Cir. 2013) (b) (6); upholding a denial on an adverse credibility finding. Respondent asserted a fear of persecution based on his practice of DZ Gong, a religion. He claimed to have been brutally beaten by the Chinese police because of his practice. Two years after leaving China, he voluntarily returned because he “heard that police in China were not arresting people anymore.” *Id.* at 1134. Still, he states that he was arrested and again badly beaten because of his religious practice. He left China again and sought asylum in the United States. This is a Pre-REAL ID case. CALLAHAN.

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, China (2013). The Circuit accepted the material inconsistency: “Cui’s written statement failed to mention that he was required to report weekly to the police station after his 1999 detention ended or that he was under police supervision when he left China in 2003. . . . these allegations were significant because Cui contends that he had to ‘escape’ China and that the police were interested in him when he returned to China in 2003. . . . the lack of any corroborative evidence of Cui’s arrests or of the ban on DZ Gong. . . . it was ‘implausible that someone would travel all the way from China to Mexico, with the claimed purpose of applying for asylum in the United States, and ultimately simply return to China despite fears of harm awaiting him there.’” 712 F.3d at 1336. The Circuit cited to *Sidhu v. INS*, 220 F.3d 1085, 1090 (9th Cir. 2000) for the proposition: “If the trier of fact either does not believe the applicant or does not know what to believe, the applicant’s failure to corroborate testimony can be fatal to his asylum application.” *Id.* at 1336. “The IJ reasonably found that, if Cui’s reason for going to Mexico was to escape political or religious persecution by seeking asylum in the United States, he surely would have made some attempt to enter the United States during the two years he resided in Mexico.” *Id.* at 1337. “The IJ also reasonably found that if Cui really feared persecution in China, he would have sought asylum in Mexico, and would not have chosen instead to voluntarily return to China.” *Id.* (citing *Loho v. Mukasey*, 531 F.3d 1016, 1017-18 (9th Cir. 2008)).

- ✓ *Li v. Holder*, 656 F.3d 898 (9th Cir. 2011) (b) (6). Affirming a denial of relief. Respondent’s claim was based on problems he reported and anticipated due to his participation in Falun Gong. Credibility was not at issue. He was granted withholding of removal but denied asylum. The Board had remanded the case back to the IJ for completion of background checks. The circuit held, over the government’s objection, that it did have jurisdiction to review the administrative decision even without the completion of such. TALLMAN.

Discretion/Administrative Exercise Of, Upheld, China (2011). The basis of denial of the asylum claim was: “that Li’s method of entry into the United States – being concealed in a metal box that was welded to the bottom of a car and driven across the border in the desert heat – was so dangerous that asylum should be denied.” (At 899). In upholding the decision, the circuit

emphasized various factors. Respondent had been granted substantive relief in terms of withholding of removal. He was a young, single man who did not have family members who would be adversely affected by the denial. “Li had been aware he could simply walk to the United States and request asylum, yet he chose to avoid detection by employing a dangerous approach.” (At 900). “Li had placed himself in a more dangerous position than he would have faced if he had been deported to China, and that he was not compelled to leave Mexico, where he had never seriously pursued asylum.” (*Id.*). “[T]he BIA is not required to grant asylum to every qualified applicant. . . . Otherwise there would be no meaning behind the power to exercise a discretionary denial.” (At 906).

- ✓ ***Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011)** (b) (6);³ Affirming a denial of relief but dramatically limiting the impact of the REAL ID Act in terms of both credibility

³ *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc) is the current standard with regard to applying burden of proof issues with regard to statutory eligibility when there is an inconclusive record of conviction in a cancellation of removal (COR) case under the REAL ID Act. This is a highly fractured opinion with a bare shifting majority opinion and two dissents. The decision overrules *Sandoval Lua v. Gonzales*, 499 F.3d 1131 (9th Cir. 2007) and *Rosas-Castaneda v. Holder*, 655 F.3d 875 (9th Cir. 2011), which had held that in such a situation the respondent may still seek COR. It arises in the context as to whether the respondent should be deemed to have been convicted of an aggravated felony which, if so, would be an automatic disqualification for COR.

In *Young*, the government offered the charging document and a judgment of conviction with regard to misconduct as to “cocaine base.” The court holds that these documents were “inconclusive” as to whether the respondent had been so convicted. The court first applied the “categorical” approach and found the statute to have been “over broad” as compared to the federal generic drug control statutes. It then applied the “modified categorical approach” (MCA) and again reached the same conclusion because the respondent could have been convicted of “solicitation.” One of the dissents argued that the court could look to other probative information to establish the basis of the misconduct, such as in this case: “Young responded by testifying under oath that he had in fact pleaded guilty to sale of narcotics, which was an aggravated felony.” 697 F.3d at 997. The majority emphasizes the strictness of relying only on the *Shepherd* documents; those being: “the charging document, transcript of the plea colloquy, plea agreement” and judgment. This would not include the respondent’s oral admission.

Aguilar-Turcios v. Holder, 740 F.3d 1294 (9th Cir. 2014) applies *Descamps v. United States*, 133 S. Ct. 2276 (2013), to reverse a finding of removability involving an individual who had been convicted, after court martial, of misusing a government computer by “wrongfully and knowingly possess[ing] visual depictions of minors engaging in sexually explicit conduct.” 740 F.3d at 1295 (citations omitted). The court found that it may only consider the “elements of the statute of conviction” which were found to “sweep[] more broadly” than the “generic” federal offense which would have required that “the defendant’s conduct to involve a visual depiction of a minor engaged in sexually explicit conduct.” *Id.* at 1300.

The modified categorical approach “ha[d] no role to play in this case” in that the convicting statute did not have a “listing [of] potential offense elements in the alternative.” *Id.* Hence, this was the result even though the respondent could only have been convicted for misconduct “relating to child pornography” under INA section 101(a)(43)(I). The court quoted from *Descamps*:

A statute of conviction punishes possession of pornography, but a federal law carries a sentence enhancement for possession of child pornography. Is the statute of conviction overbroad because it includes both adult and child pornography; or is that law instead missing the element of involvement of minors? . . . We see no reason why

this distinction should matter. Whether the statute of conviction has an overbroad or missing element, the problem is the same: Because of the mismatch in elements, a person convicted under that statute is never convicted of the generic crime. *Id.* at 1302 n.10 (quoting *Descamps*, 133 S. Ct. at 2292).

United States v. Garcia, 733 F.3d 366 (9th Cir. 2014) applied *Descamps* to find a Nevada conviction for conspiracy to commit burglary not to have been an aggravated felony under 8 U.S.C. § 1101(a)(43)(U), dealing with convictions involving “an attempt or conspiracy to commit an offense described in this section” to wit: a “burglary” as set out in section (G). The state statute was “overbroad” in the sense that it did not require proof of an overt act and hence criminalized a broader range of conduct than the federal or “generic” definition of conspiracy. In doing so, the decision rejects *Matter of Richardson*, 25 I&N Dec. 226 (BIA 2010), which held that a conspiracy conviction would categorically be an aggravated felony in that there was no need to require the establishment of an overt act in the furtherance thereof.

United States v. Flores-Cordero, 723 F.3d 1085 (9th Cir. 2013), applied *Descamps* to determine whether an individual had been convicted of a crime of violence, overruling previous Ninth Circuit case law. In determining that resisting arrest was not a crime of violence, the Circuit rejected the Government’s request that the case be remanded for application of the modified categorical approach, because the statute was “not a divisible statute with alternative elements.” 723 F.3d at 1089.

Young “had submitted documents showing a request to the state criminal court for records that might arguably have had the potential to assist him in his claim, but the record did not show that he had received such records.” 697 F.3d at 997. Both dissents raise the practical difficulty of where this leaves the respondent in terms of meeting his burden to show eligibility. “If the government does not produce [the record of conviction], which its attorneys may have no reason to do, how will the lawful permanent resident be able to locate it, or even know that it exists?” *Id.* at 992. The second dissent raises similar concerns: “an alien who has not been convicted of an aggravated felony is subject to the vagaries of state and local court recordkeeping systems and has only the hope that the relevant documents can be found (assuming they exist). If the limited documents allowed under *Shepard* do not resolve the question, the alien has no recourse.” *Id.* at 1003.

Lopez-Vasquez v. Holder, 706 F.3d 1072 (9th Cir. 2013) dealt with burden of proof issues in the context of whether an individual could be given AOS after a drug conviction. He argued that the court that initially convicted him of possession of marijuana for sale had modified the judgment so that he could take advantage of case law that an analogous conviction under the Federal First Offender Act (FFOA) would not lead to adverse immigration consequences. “The alien has the ‘burden of establishing . . . clearly and beyond doubt’ that he is ‘entitled to be admitted and is not inadmissible under [8 USC §] 1182” criminal grounds of inadmissibility. *Lopez-Vasquez*, 706 F.3d at 1074 (quoting *Valadez-Munoz v. Holder*, 623 F.3d 1304 (9th Cir. 2010)). Denial of relief was upheld in that the subsequent court action was “inconclusive.” Furthermore, “an alien cannot carry this burden [to show admissibility] ‘by merely establishing that the relevant record of conviction is inconclusive as to whether’ the conviction was for an offense that would make the alien inadmissible.” *Id.* (quoting *Young v. Holder*, 697 F.3d 976 979-80, (9th Cir. 2012) (en banc)).

United States v. Bustos-Ochoa, 704 F.3d 1053 (9th Cir. 2012) involved a prosecution for criminal re-entry, where Respondent attacked the validity of his prior removal order. Respondent argued that he should have been given the opportunity to apply for voluntary departure and, therefore, his removal order was invalid. At his original removal proceedings, Respondent stated that he had been convicted for “possession of methamphetamine.” The Government did not file any documents from the record of conviction, which would have shown that Respondent had actually been convicted of possession of methamphetamine *for purpose of sale*. The IJ ruled that Respondent was ineligible for voluntary departure, because he had been convicted of a drug crime. Although the IJ’s ruling was technically correct because Respondent’s actual conviction was an aggravated felony, it was incorrect based on the assumption that the conviction was for mere possession. However, the decision cites to 8 C.F.R. § 1240.8(d), “placing the

determinations and the expectation to provide corroborative evidence. Respondent claimed he had suffered persecution because of his membership in a Chinese Christian “house church.” There had been three hearings before the IJ. The circuit ultimately upheld the decision because it finds that he respondent had been given explicit notice of the need to have provided specific corroborative material, that was reasonably available, along with a five month continuance, and simply did not do so. The decision essentially adopts the dissent of Judge Berzon in the panel decision that was reversed in the en banc decision of *Singh v. Holder*, 649 F.3d 1161 (9th Cir. 2011), but which did not speak to this issue. REINHARDT.

Credibility - Post-REAL ID/Procedure (2011). “[T]he IJ must determine whether an applicant’s credible testimony alone meets the applicant’s burden of proof. If it does, no corroborative evidence is necessary. If a credible applicant has not yet met his burden of proof, then the IJ may require corroborative evidence. If corroboration is needed, however, the IJ must give the applicant notice of the corroboration that is required and an opportunity either to produce the requisite corroborative evidence or to explain why that evidence is not reasonably available.” (at 1093). “This does not necessarily require two hearings. If the applicant states at the first hearing that he does not have the evidence and cannot reasonably obtain it, the IJ should grant him an opportunity at that point to state why he cannot reasonably obtain it. In such a case, a continuance to obtain the evidence would be unnecessary; the IJ must then evaluate the applicant’s explanation and determine on the record whether the evidence is reasonably obtainable or whether other evidence might suffice.” (at 1092 n.12). In this case, at the last hearing, the IJ did not specifically ask as to why the requested corroborative material had not been provided, “Although it would be desirable for an IJ to ask whether there is a reason that an applicant fails to provide the corroborative evidence that he has been asked to produce,” the result was upheld. The circuit notes its explicit disagreement with *Abraham v. Holder*, 647 F.3d 626 (7th Cir. 2011) “no notice or opportunity to provide corroborative evidence was required.” (at 1092 n.13).

Credibility - Post-REAL ID/Adverse Finding, Upheld, China (2014). The circuit discusses *Shrestha v. Holder*, 590 F.3d 1034 (9th Cir. 2010), but limits it. It emphasizes that adverse credibility decisions must not only be grounded on substantial evidence but “IJs remain obligated to provide ‘specific and cogent reasons supporting an adverse credibility determination.’” (at 1085). The adverse credibility determination was rejected as having been based on “trivial” factors. These included repeated misstatements as to dates and time sequence of events but their overall import were found to have been “mischaracterized” by the IJ.

Credibility - Post-REAL ID/Religious Knowledge, Not Upheld. An additional reason for the adverse credibility finding was that his “knowledge of Christianity was at best less than basic.” (at 1088). The respondent has been asked to recite the Lord’s Prayer. The “IJ could only speculate that the ‘Lord’s Prayer’ was called by the same name in China; no basis for that conclusion is found in the record. In general, questioning an applicant on his knowledge of

burden of proof to establish eligibility for discretionary relief on the alien.” *Id.* at 1057. The Circuit found that accepting Respondent’s argument “would require that the government affirmatively disprove an alien’s eligibility for discretionary relief—even before the alien applied for that relief—or risk successful collateral attack on the removal order in subsequent proceedings.” *Id.* (emphasis in the original).

religious doctrine to determine if he is a true believer is not an appropriate method of determining eligibility for asylum.” (*Id.*).

- ✓ ***Zheng v. Holder*, 644 F.3d 829 (9th Cir. 2011)** (b) (6); Affirming a denial of CAT relief but remanding a denial of section 212(c) relief. Due to Respondent’s criminal record, he was found ineligible for asylum and withholding of removal. The circuit found that the Board had given inadequate consideration to Respondent’s “value and service to the community” in determining whether he merited an award of discretionary relief. The basis of the CAT claim was “due to his status as a convicted criminal and deportee, his possible future status as a returned resident from the United States without strong family support, and his outspoken nature.” (at 835). SCHROEDER.

CAT/More Likely Than Not, Not Found, China (2011). The circuit found that the concerns expressed were speculative based on conflicting evidence in the record. The circuit thus found that the IJ permissible made the finding. An expert’s opinion to the contrary was found unpersuasive, because there were sufficient facts in the record contrary to his central assumption.

- ✓ ***Lin v. Holder*, 588 F.3d 981 (9th Cir. 2009)** (b) (6); affirming a denial of a motion to reopen. The IJ had denied the original asylum claim and the Board dismissed the appeal. Respondent filed a motion to reopen asserting “changed country conditions.” She argued that because she now has children born in this country, she would be subjected to forced sterilization if she had to return to China. She submitted documentary evidence in support of her claim.⁴

Motion to Reopen/China; Changed Country Conditions. The court stated “we agree with [*Liu v. Att’y Gen.*, 555 F.3d 143 (3rd Cir. 2009)] that the Board’s precedent decision . . . that the ‘Chinese government does not have a national policy requiring forced sterilization of a parent who returns with a second child born outside of China.’” In doing so, the court accepted *Matter of J-W-S-*, 24 I&N Dec. 184 (BIA 2007).

Motion to Reopen/Changed Circumstances, Affirmed, China (2009). The court explained: “we have previously concluded that ‘the birth of children outside the country of origin is a change in personal circumstances that is not sufficient to establish changed circumstances in the country of origin within the regulatory exception’” *He v. Gonzales*, 501 F.3d 1128 (9th Cir. 2007). The respondent sought unsuccessfully to denominate her motion as one having to do with changed country conditions, arguing that the coercive family practices had become “more stringent.”

Asylum Application/Successive. The court would not permit the respondent to proceed on a “successive” asylum application under 8 U.S.C. § 1158(a)(2)(D), regarding “the existence of changed circumstances which materially affect the applicant’s eligibility for asylum.” The court relied on *Chen v. Mukasey*, 524 F.3d 1028, 1030 (9th Cir. 2008), explaining “in *Chen*, we

⁴ A similar result was reached in *Lin v. Holder*, 620 F.3d 807 (7th Cir. 2010). The claim was denied despite the birth of two USC children which respondents claimed violated the Fujian one child policy. The circuit held that it was proper to rely on a Department of State report which discussed the impact of the policy in Fujian on children born in another country.

determined that it was reasonable for the BIA to conclude that to permit such an avoidance of the time and number limits on motions to reopen by allowing a free standing claim for asylum under § 1158(a)(2)(D) would make no sense of the more restrictive exception in § 1229a(c)(7)."

- ✓ ***Chen v. Mukasey*, 524 F.3d 1028 (9th Cir. 2008)**; affirming the denial of a motion to reopen to pursue an asylum claim on "changed personal circumstances," referring to the respondent having married and given birth to two children. The respondent expressed fear that if she had to return to China either she and/or her husband would be subject to a coercive family planning practice. CANBY.

Motion to Reopen/Changed Circumstances, Affirmed, China (2008). The court accepted and applied *Matter of C-W-L*, 24 I&N Dec. 346 (BIA 2007). The general requirements with regard to the timing and number of motions to reopen may be applied to asylum applicants notwithstanding the broader provisions of INA § 208(a)(2)(D) as they permit motions to reopen based on "the existence of changed circumstances which materially affect the applicant's eligibility for asylum." (at 1030) (internal citations omitted). The court distinguished prior case law "suggesting that aliens in Chen's position may seek asylum without a motion to reopen." (at 1033). The court upheld the denial of a CAT claim as well. In characterizing the general requirements as to a motion to reopen as "reasonable," the court noted its agreement with *Foroglou v. Reno*, 241 F.3d 111, 113 (1st Cir. 2001) (rejecting a claim that CAT overcomes time limits for assertion of claims in deportation proceedings). (at 1033) (internal quotation marks omitted).

- ✓ ***He v. Gonzales*, 501 F.3d 1128 (9th Cir. 2007)** (b) (6); affirming a denial of a motion to reopen to again pursue an asylum application based on the subsequent birth of two U.S. citizen children. Respondent argued that the birth of what would now be his third child would make him "subject to forced sterilization." TALLMAN.

Motion to Reopen/Changed Circumstances, Affirmed, China (2007). The court cited to *Zheng v. USDOJ*, 416 F.3d 129 (2d Cir. 2005), *Wang v. BIA*, 437 F.3d 270 (2d Cir. 2006), and *Zhao v. Gonzales*, 440 F.3d 405 (7th Cir. 2005) in support of its conclusion that one cannot "establish changed circumstances sufficient to satisfy the exception to the time and number bars applicable to a motion to reopen based on the birth of children in the U.S. and the resulting threat of forced sterilization if returned to the country of origin." The court also cited approvingly to an unpublished Sixth Circuit decision in which a citizen of Guinea was found not to have established "changed circumstances" with regard to the risk of FGM being imposed on a USC child if denied relief. *Bah v. Attorney General*, 230 F. App'x 547 (6th Cir. 2007). Although not cited, see further, *In re A-K-*, 24 I&N Dec. 275 (BIA 2007) (finding that an alien may not establish eligibility for asylum based solely on fear that a daughter will be harmed by being forced to undergo FGM upon the return to the alien's home country). Citing *Wang*, supra, at page 270, the court agrees that where "a petitioner is seeking to reopen his asylum case due to circumstances of his own making after being ordered to leave the U.S.... it would be ironic indeed if [those] who remained in the United States illegally following an order of deportation, were permitted to have second and third bites at the asylum apple simply because they

managed to marry and have children while evading the authorities.” This apparent “gaming of the system” is not to be permitted.

Distinguishing *Shou Young Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006). A motion to reopen was denied by the BIA but a petition for review was granted in a coercive family planning claim. There, the documentation was found to be “persuasive” and the birth of the U.S. child was before the entry of a final administrative order.

- ✓ ***Gu v. Gonzales*, 454 F.3d 1014 (9th Cir. 2006)** (b) (6); denying rehearing en banc, withdrawing and superceding previous opinion at 429 F.3d 1209 (9th Cir. 2005). Upholding a denial of asylum to a Chinese Christian who attended a “house” or unregistered church. He had “distributed Christian religious materials.” “He was arrested . . . and detained at the police station for three days . . . [H]e was interrogated for two hours . . . [T]he police hit his back with a rod approximately ten times.” Afterward, Gu was required to sign a document admitting his guilt and was required to periodically report to a local police station. Although he maintained his government job, he was warned that he would be fired if he engaged in any further illegal activities. After the applicant came to the U.S. , “[a] friend told him not to call his family any longer because the ‘public security people’ came to his house to look for him. Gu believes that Chinese authorities looked for him because he had sent religious materials from the U.S. to China.” There was no issue as to credibility. BEEZER; dissent by PREGERSON.

Persecution/Not Rising to Level Of, China (2006). The court, over a strong dissent, determined that Gu had not established past persecution because he was detained and beaten on only a single occasion, he did not require medical treatment, and he maintained his employment. Additionally, the court held that Gu did not establish any state-imposed limitation on his right to practice his religion, other than the prohibition on religious leafleting.

Evidence/Hearsay, China (2006). In the absence of an adverse credibility determination, the factfinder must accept the applicant’s contentions as true. However, “where an asylum applicant’s testimony consists of hearsay evidence, the statements by the out-of-court declarant may be accorded less weight by the trier of fact when weighed against non-hearsay evidence” because it is less persuasive than a first-hand account.⁵

- ✓ ***Huang v. Ashcroft*, 390 F.3d 1118 (9th Cir. 2004);** (1) all motions to reopen any proceedings that resulted in entry of final order of removal prior to March 22, 1999, in order to seek

⁵ In *Mei v. U.S. Dept. of Justice*, 489 F.3d 517 (2d Cir. 2007), the Second Circuit extended the principle announced in *Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006), holding that the IJ’s adverse credibility finding was properly based on “the nearly identical language in the written affidavits [petitioner] submitted,” which the petitioner had alleged were from different people in India. *Singh*, 438 F.3d at 148. In *Mei*, the court extended *Singh* to apply to *inter*-proceeding similarities as well as to *intra*-proceeding similarities. That is, an IJ may properly rely on “striking similarities between affidavits that were submitted *separately* by ostensibly unrelated asylum applicants” as evidence of incredibility. *Mei*, 489 F.3d at 519. The court emphasized that the respondent must be provided notice of the similarities and the court’s particular concern, an opportunity to comment thereon, and an invitation to offer evidence of “plagiarism, inaccurate translations, or any other possible innocent explanation.” *Id.* at 525.

protection under the CAT, are subject to time limitation imposed by regulation implementing the CAT, without regard to form of protection, withholding of removal or deferral of removal, to which alien would be entitled if successful; (2) as prudential matter, alien against whom final order of removal was entered prior to March 22, 1999 had to first exhaust his administrative remedies, by filing motion to reopen, as prerequisite to seeking such protection in habeas corpus petition filed with district court; affirming district court's denial of habeas petition; RYMER.

- ✓ *Li v. Ashcroft*, 378 F.3d 959 (9th Cir. 2004) (b) (6)); *reh'g en banc denied*, 396 F.3d 1073 (9th Cir. 2005); upholding IJ's adverse credibility determination; FARRIS; (NOONAN, dissenting: adverse credibility determination was based solely on speculation and was fraught with arbitrariness; nothing in the record rebuts petitioner's claim that he will face persecution as the father of three sons).

Credibility - Pre-REAL ID/Omissions, Affirmed, China (2004); Inconsistencies, Material, Affirmed, China (2004). Three prior asylum applications failed to mention that petitioner's wife had been forcibly sterilized after he was detained and threatened with sterilization himself; petitioner denied ever being persecuted by the Chinese government when interviewed at the airport; and petitioner's testimony regarding fine amounts he was ordered to pay for each additional child was inconsistent with his earlier applications. Petitioner's continued presence in the country was in hiding and does not support a lack of credibility ruling; however, the fact his wife has traveled freely to their home town without any trouble may reasonably be considered inconsistent with petitioner's claim that his family was so afraid of being arrested that it was forced to go deep into hiding. (at 964).

Credibility/Documents to Impeach, Permitted. Prior asylum applications completed at a law firm by an assistant who reviewed the forms with the applicant in his native language and signed under penalty of perjury have impeachment value as prior inconsistent statements. (at 962).

- ✓ *Wang v. INS*, 352 F.3d 1250 (9th Cir. 2003) (b) (6)); upholding IJ's adverse credibility determination and denying the petition; WALLACE.

Evidence/Authentication, Inability To, Affirmed. INS forensics expert's inability to determine authenticity of alien's documents does not provide a reasonable basis for concluding that the documents are anything other than what they purport to be, even though the State Department reported widespread fabrication and fraud. (at 1254).

Credibility - Pre-REAL ID/IJ Speculation, Affirmed, China (2003). Minor discrepancies in birth certificates and hospital records may be suspicious, but cannot form a reasonable basis upon which to contest credibility. "While we understand the IJ's suspicion, her basis for questioning these documents amounts to nothing more than a subjective view of what these documents would look like." (at 1255). "Speculation and conjecture may not 'substitute for substantial evidence,' but an IJ need not ignore palpable inconsistencies in a petitioner's

testimonial and documentary evidence that directly undermine his allegations of persecution.” (at 1258).

Credibility - Pre-REAL ID/Implausibility, Affirmed, China (2003). Alien’s obvious evasiveness in explaining his contradictory testimony was sufficient to support an adverse credibility finding. “While he claimed he did not mention the stillbirth earlier due to a superstition, apparently this superstition did not prevent him from speaking of the stillbirth one week later. It strains credulity to believe that Wang would fail to mention in either his asylum applications or his previous sworn testimony the alleged death of a stillborn child—the very incident that supposedly formed the basis for the Chinese government’s alleged sterilization attempt.” (at 1257). In addition, notarial certificate issued in the same district alien claimed to have fled years earlier contradicts his claim that he was concealing himself from the district authorities during the period in question. (at 1257).

- ✓ *Li v. INS*, 92 F.3d 985 (9th Cir. 1996) ((b) (6)); denying petition to review based on findings that (1) applicant did not establish he was eligible for asylum based on his membership in a social group of Chinese citizens with low economic status; his arrest after fight at restaurant was not persecution on account of political opinion; (3) presumption that he had well-founded fear of persecution on account of religion from arrest of family member at church was rebutted by his own testimony that he and other residents of his village continued to attend church regularly until he left; (4) his exclusion from high school did not provide basis for past persecution on account of political opinion; (5) his fear of punishment from unpaid smugglers did not amount to fear of persecution; and (6) he failed to demonstrate that punishment for illegal departure would be pretext for persecution on account of his political opinion; *GOODWIN*; distinguished by *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996).

✕ *Not Affirmed*

- ✕ *Yang v. Lynch*, 822 F.3d 504 (9th Cir. 2016) ((b) (6)); in an amended decision, granting a petition for review where the BIA denied a motion to reopen asserting a new basis for asylum relief. The BIA had affirmed the IJ’s denial of the alien’s applications for relief after the IJ found his testimony not credible. *Id.* at 507. In the alien’s motion to reopen, he asserted a new factual basis for relief, namely, he joined a Christian church whose members were persecuted in China, which led to threats being made to his wife. *Id.* The BIA denied the motion, finding that, as in the old proceedings, the alien’s testimony (in the form of the affidavit submitted with the motion) was not credible. *Id.* *CHHABRIA*. Dissent by *SCHROEDER*, agreeing that the BIA should not make adverse credibility determinations but disagreeing with the majority’s finding that the BIA did so in this case.

Credibility - Post-REAL ID/False in One Thing, False in Everything, China (2016). The Circuit reiterated its holding “that an immigration judge may use the maxim *falsus in uno, falsus in omnibus*—‘false in one thing, false in everything’—to find that a witness who testified falsely in one respect at a removal hearing is also not credible in other respects.” *Id.* at 507 (citing *Enying*

Li v. Holder, 738 F.3d 1160, 1161-62 (9th Cir. 2013)). The Second Circuit expanded this rule, allowing the BIA to “apply the *falsus* maxim, relying on an immigration judge’s prior adverse credibility determination to make its own finding that evidence supporting a motion to reopen is not credible.” *Id.* at 508 (citing *Qin Wen Zheng v. Gonzales*, 500 F.3d 143, 146-47 (2d Cir. 2007)). The Ninth Circuit disagreed, holding that the BIA cannot apply the *falsus* maxim in denying a motion to reopen on the basis of changed circumstances, due to its limited role in reviewing IJs’ credibility determinations. *Id.* Moreover, the Circuit noted that “the *falsus* maxim is discretionary rather than mandatory.” *Id.*

- ✱ *Lai v. Holder*, 773 F.3d 966 (9th Cir. 2014) (b) (6); in an amended decision, the Circuit reversed and remanded a denial of relief. The respondent had been found incredible with regard to his asserted membership in a Chinese Christian church that resulted in significant physical abuse by the police. This was a REAL ID Act case. FISHER.

Credibility - Post-REAL ID/Adverse Finding, Not Upheld, China (2014). The basis of the IJ’s decision was “Lai’s failure to include ‘key events’ mentioned during cross-examination in his written statement or direct testimony,” as well as “Lai’s ability to leave China without problems, when the country conditions report indicated that illegal religious activities would ordinarily have been a basis for denying exit authority,” and “evidence demonstrating that Lai was ‘at best a Christian of convenience.’” *Id.* at 969. The Circuit cited to pre-REAL ID Act case law, which provided “that ‘the mere omission of details is insufficient to uphold an adverse credibility finding.’” *Id.* at 971 (quoting *Singh v. Gonzales*, 403 F.3d 1081, 1085 (9th Cir. 2005)). The Circuit found that in the context of the case and in light of certain questions that were “imprecise and subject to different interpretations, especially for non-native English speakers or individuals working with a translator,” *id.* at 973 n.1, the missing information constituted “omissions but not substantive inconsistencies.” *Id.* at 973. Further, since “the [additional] information concerned events and adverse consequences for third parties, not for Lai himself . . . the initial omission of incidents affecting only third parties is less probative of credibility.” *Id.* at 973-74. The Circuit rejected the IJ’s finding that the respondent was “at best a Christian of convenience” because that did “not follow from Lai’s testimony that ‘he tries to attend services once a week, but if he has work projects that require his presence, he forgoes the church services for work.’” *Id.* at 975 n.2.

Credibility - Post-REAL ID/Corroboration, Not Required, China (2014). The Circuit found that corroborative evidence could not be required. “[A]n IJ must provide an otherwise credible applicant such as Lai with ‘notice and opportunity to either produce the evidence or explain why it is unavailable.’” *Id.* at 975 (quoting *Zhi v. Holder*, 751 F.3d 1088, 1094 (9th Cir. 2014); *Ren v. Holder*, 648 F.3d 1079, 1090-92 & n.13 (9th Cir. 2011)). In *Lai*, as in *Zhi*, “the IJ erred because she did not provide notice to [Lai] that he was required to present the corroborative evidence she referred to in her decision. Nor did the IJ give [Lai] the opportunity [either to produce the evidence or] to explain why such evidence was unavailable.” *Lai*, 773 F.3d at 975-76 (quoting *Zhi*, 751 F.3d at 1095) (alterations in original). In its opinion amending *Lai v. Holder*, 764 F.3d 1098 (9th Cir. 2014), the Circuit denied the Government’s motion to delete the discussion of *Zhi* and *Ren*, but clarified that it applies *Ren* when “the IJ found the [applicant] not credible; the IJ

relied on the lack of corroboration as part of that ‘overall credibility determination’; and, on review, [the Circuit] rejected each of the IJ’s other reasons—besides lack of corroboration—for the adverse credibility finding.” *Lai*, 773 F.3d at 976 (citing *Zhi*, 751 F.3d at 1091-95 & n.5).

Credibility/State Department Reports, Reliance On, China (2014). “[T]he IJ’s reference to Lai’s apparent ability to leave China without problems would not be sufficient on its own to support the adverse credibility finding.” *Id.* at 975 n.2 (citing *Zheng v. Ashcroft*, 397 F.3d 1139, 1143 (9th Cir. 2005) (“The IJ may use a country report as supplemental evidence to discredit a generalized statement made by the petitioner but not to discredit specific testimony regarding his individual experience.” (internal quotation marks omitted))).

- ✱ *Ai Jun Zhi v. Holder*, 751 F.3d 1088 (9th Cir. 2014) (b) (6)); reversing and remanding a denial of relief. This was a REAL ID Act case. The respondent had been found incredible. The respondent had claimed to be at risk on the basis of having stocked books in his bookstore about Falun Gong. He did not claim any physical mistreatment. The adverse credibility determination had been based on an inconsistency in terms of a date as well as what the IJ had felt to have been a “‘very short-lived marriage to a U.S. citizen’ which she interpreted as an ‘attempt to remain in the US’” as well as the “failure to submit reasonably available corroborating evidence.” 751 F.3d at 1090. PAEZ.

Credibility - Post-REAL ID/Adverse Finding, Not Upheld, China (2014). In rejecting the reliance on the inaccurate date, the IJ “ignored” evidence of “business receipts” which “support Zhi’s explanation that his sister made a mistake when she dated her letter.” *Id.* at 1092. With regard to the length of the 16-month marriage, “it was error to draw an adverse inference without first considering and addressing Zhi’s explanation” and that such was impermissible “speculation.” *Id.* at 1093. The court then cites to a number of pre-REAL ID Act cases.

Credibility - Post-REAL ID/Corroboration, Not Accepted, China (2014). The decision applies *Ren v. Holder*: “[T]he IJ must provide an otherwise credible applicant with ‘notice and an opportunity to either produce the evidence or explain why it is unavailable.’” *Id.* at 1094 (quoting 648 F.3d 1079, 1092 (9th Cir. 2011)). Indeed, the court finds that “the Fifth Amendment right to a ‘full and fair hearing’ provides the applicant with ‘a reasonable opportunity to present evidence on his behalf.’” *Id.* at 1095.

- ✱ *Zhao v. Holder*, 728 F.3d 1144 (9th Cir. 2013); reversing a denial of a motions to remand and/or reopen. The respondent sought a new asylum hearing on the basis that, after her first hearing, she had given birth to another child in the United States. The respondent presented a recent notice from a local governmental entity which recited her name and stated: “You are currently in the US. But you are still a Chinese citizen and should be placed in the category to undergo sterilization”. THOMAS

Motion to Reopen/China. The Circuit faulted the Board for having required “one piece of evidence that conclusively proves that she would be subject to persecution if she is returned to China “ and having deviated from its established policy. “In asylum cases involving China’s family planning policy, the BIA reviews ‘the details of local family planning policies, proof that the alien violated such policies, and evidence that local enforcement efforts against the violation

will rise to the level of persecution,' and looks to the 'alien's local province, municipality, or other locally-defined area,'" *Matter of J-H-S-*, 24 I&N Dec. 196, 201 (BIA 2007).

Evidence/Authentication, Original Documents. The Board had noted in its denial that the respondent had provided copies and not "original" and "authenticated" documentation from China. "A petitioner's failure to obtain government certification of a foreign public document's authenticity is not necessarily a bar to admission of the document." *Vatyan v. Mukasey*, 508 F.3d 1179, 1183 (9th Cir. 2007). Original documents are simply not required.

- * *Hu v. Holder*, 652 F.3d 1011 (9th Cir. 2011) (b) (6)); reversing a denial of relief. The IJ's credibility finding was accepted. There were claims of physical violence and harsh detention. Respondent reported various problems growing out of an employment issue. He was denied relief on the basis that the problems were over a "private employment issue." This is a REAL ID Act case. The circuit found that "pro-labor position constituted a protected political opinion." (at 1017). PREGERSON.

Nexus/Central Reason, Post REAL ID, Not Affirmed, China (2011). The circuit cites to several pre-REAL ID Act decisions for the proposition that "An imputed political opinion is a valid basis for relief." Moreover, "We have repeatedly recognized that labor speech in many instances can be political." *Zavala-Bonilla v. INS*, 730 F.2d 562, 563 (9th Cir. 1984); *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996); *Agbuya v. INS*, 241 F.3d 1224, 1229 (9th Cir. 2001); *Vera-Valera v. INS*, 147 F.3d 1036, 1037-38 (9th Cir. 1998). "[O]ur case law makes clear that labor agitation advancing economic interests can nevertheless express a political opinion." (at 1018).

Additionally, the IJ had denied relief based in part on the fact that the "protest seems to have been an illegal gathering for which he was arrested for disturbing the peace." (at 1018). The police mistreated him and accused him of "gathering a crowd to cause trouble and disturb the order of the society." (at 1018). The circuit limited *Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009), by emphasizing the need to only demonstrate that the basis of the persecution only be "one of the central reasons." "The absence of any legitimate criminal prosecution is circumstantial evidence suggesting the Chinese government was not legitimately punishing Hu for protesting without a permit or simply disturbing the peace." *Ndom v. Ashcroft*, 384 F.3d 743, 755 (9th Cir. 2004).

- * *Liu v. Holder*, 640 F.3d 918 (9th Cir. 2011) (amended decision entered and petition for rehearing denied) (A77-309-486); remanding a determination of a frivolously filed I-589 application. This is a pre-REAL ID Act case. The alien based her claim on alleged problems she experienced as a Falun Gong follower. FISHER.

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, China (2011). The circuit accepted the administrative determination that the respondent was not credible. This finding was based on date discrepancy, "failure to mention Falun Gong at her airport interview," and inconsistencies between a relative's letter intended to support the claim and other information of record. (at 923). The circuit approvingly cites to *Li v. Ashcroft*, 378 F.3d 959 (9th Cir. 2004), and *Zhi v. Mukasey*, 537 F.3d 1034, 1041 (9th Cir. 2008).

Administrative Proceedings/Reliance on Adjudicator's Interview. The circuit limited *Singh v. Gonzalez*, 403 F.3d 1081, 1089 (9th Cir. 2005): "This interview was transcribed and is part of the administrative record. The officer provided Liu with an interpreter and gave her an opportunity to clarify her answers at the conclusion of the interview. Accordingly, the IJ and the BIA could use the interview transcript to impeach Liu's credibility even though the asylum officer did not testify at the hearing." (at 923 n.2).

Asylum Application/Frivolous, Not Found, China (2011). The circuit discusses the "distinction between an applicant for asylum whose testimony lacks credibility and one who has 'deliberately fabricated' material aspects of her application." (at 928). The circuit found that the frivolous finding was not adequately supported, consistent with *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007). The circuit emphasizes that to justify a frivolous finding, there must be "a finding that a 'material element' of the claim was fabricated, whereas an adverse credibility determination may be supported by an inconsistency or apparent falsehood that merely *relates to* a material element of the claim." (at 930) (emphasis in the original). Furthermore, there is a "heightened scienter requirement," and the "burden shifts to the government to prove the applicant has filed a frivolous application." (*Id.*). Moreover, "frivolousness must be proven by a preponderance of the evidence, whereas an adverse credibility finding must be supported only by substantial evidence." *Id.* (citing *Khadka v. Holder*, 618 F.3d 996 (9th Cir. 2010)).

Due Process/IJ Bias, Not Found, China (2011). Notwithstanding the IJ "actively questioning Liu to determine whether inconsistencies could be resolved, the IJ did not show a 'predisposition to discredit' Liu's testimony." (at 931).

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- * *Li v. Holder*, 629 F.3d 1154 (9th Cir. 2011) ((b) (6)); reversing a denial of relief on credibility grounds. This is a pre-REAL ID Act case. The alien presented a claim based on membership in a "house" Christian church. He asserted that he had suffered significant physical violence. In support of her decision, the "IJ noted Li's evasive demeanor, inconsistency, lack of documentary proof, and failure to answer adequately what she considered basic questions about Christianity." (at 1154). The circuit faulted the IJ for not giving specific examples to justify the reference to demeanor and stated that the IJ otherwise did not go beyond a "general declaration of evasiveness or inconsistency [which] is insufficient as a basis for adverse credibility." (at 1156) (citing *Garrovillas v. INS*, 156 F.3d 1010 (9th Cir. 1998)). GOODWIN.

Credibility - Pre-REAL ID/Ignorance. The circuit took issue with the IJ's determination that the alien has an inadequate degree of knowledge about Christianity. "an IJ's perception of a petitioner's ignorance of religious doctrine is not a proper basis for an adverse credibility finding." (at 1157 n.2) (citing *Cosa v. Mukasey*, 543 F.3d 1066, 1069-70 (9th Cir. 2008)).

Credibility - Pre-REAL ID/Inconsistencies, Minor, Not Affirmed, China (2011). "This is at most a minor inconsistency or incidental misstatement that does not go to the heart of Li's claim, and does not, therefore, support an adverse credibility determination." (at 1159) (citing *Chen v. Ashcroft*, 362 F.3d 611, 617, 620 (9th Cir. 2004)).

Credibility - Pre-REAL ID/Corroboration Not Required, China (2011). "In a pre-REAL ID Act case, absent other substantial evidence of adverse credibility, the production of corroborating evidence cannot be required." (at 1160) (citing *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 855 (9th Cir. 2004)).

- ✱ *Lin v. Holder*, 610 F.3d 1093 (9th Cir. 2010) (b) (6); remanding a denial based on a finding of an untimely filed application. Respondent, who was not a follower of Falun Gong, assisted a practitioner to illegally flee China. When respondent sought asylum in the United States he provided different dates and places of entry. The IJ denied asylum on the basis that he had not met his burden to establish that he filed his application timely. The circuit upheld the IJ's additional holding that the respondent had not established that the fear he expressed relates to "prosecution" rather than "persecution." PER CURIUM. There was a concurrence by O'Scannlain calling upon the court to reverse its unique position among the various circuit courts of appeal that it has jurisdiction to review administrative decisions of untimely filings of applications for asylum.

Bars to Asylum/One Year Bar, Not Found, China (2010). The circuit found that under *Khunaverdians v. Mukasey*, 548 F.3d 760 (9th Cir. 2008), the inconsistencies regarding the date and place of entry did not defeat a finding that the respondent filed within one year of arriving because all of the events that he testified to, notwithstanding their inconsistency, placed his claim within the one-year window and his testimony was deemed credible.

Persecution/Prosecution, Not Affirmed, China (2010). "Ordinary prosecution for criminal activity is not persecution 'on account of' a protected ground. *Dinu v. Ashcroft*, 372 F.3d 1041, 1043-44 (9th Cir. 2004); *Chanco v. INS*, 82 F.3d 298, 301 (9th Cir. 1996). . . . Lin testified that Chinese authorities sought him because he assisted the Falun Gong fugitive in violation of Chinese law. Notably, Lin never testified that Chinese authorities sought him because they thought he was a Falun Gong practitioner himself or because of his Daoist beliefs. . . . Lin testified that his temple had not experienced any problems with authorities until assisting the escapee."

Persecution/Not Rising to Level Of, China (2010). The court cited to *Gu v. Gonzales*, 454 F.3d 1014, 1019-21 (9th Cir. 2006) that arrests, as here of other Temple members, would not constitute "persecution." "Brief detention, beating, and interrogation did not compel a finding of persecution."

- ✱ *Jiang v. Holder*, 611 F.3d 1086 (9th Cir. 2010) (*denying petition for rehearing*); reversing and remanding a denial of relief to a non-married individual whose partner had been forced to undergo a "forced abortion." Credibility was not at issue. PREGERSON.

Political Opinion/Opposition to CPC, Non-Marriage. The respondent and his partner were under the age of legal marriage in China. The court restated its principle that legal marriage was not necessary to get relief, citing *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) and *Tang v. Gonzales*, 489 F.3d 987 (9th Cir. 2007).

Political Opinion/Opposition to CPC, Matter of J-S-. The court accepted the Attorney General's decision in *Matter of J-S-*, 24 I&N Dec. 520, 521 (A.G. 2008) overruling *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997) and *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006). These cases had allowed "automatic or presumptive refugee status on the spouses of persons who have been physically subjected to a forced abortion or sterilization procedure pursuant to a foreign government's coercive family planning program." The circuit gave administrative deference to

the decision under *Nat'l. Cable v. Brand X*, 545 U.S. 967 (2005). The circuit noted "it does not follow that an agency may repeatedly put forward an interpretation that we have already examined under *Chevron* and found unreasonable," citing *Escobar v. Holder*, 567 F.3d 466 (9th Cir. 2009).⁶

Persecution/Other Resistance to CPC. The court reversed the administrative determination that the evidence offered of "other resistance" was inadequate to obtain relief. He was detained for "a day," he was "required to pay a heavy fine to be released," there was an attempt to further arrest him, he had to "hide from the authorities, and he was "expelled from school." The circuit found this sufficient evidence of past persecution.⁷

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- * *Li v. Holder*, 559 F.3d 1096 (9th Cir. 2009) ((b) (6)); reversing and remanding a denial of relief. The IJ had denied relief based on an adverse credibility determination and a finding that the harm complained of were not "on account of" protected criteria. The court rejected this determination with a lengthy discussion which found that the numerous reasons cited by the IJ were either "speculation" (such as reliance on the large sum of money paid by the respondent in his travel to China), "fabricated [by the IJ] inconsistencies," or otherwise not "going to the heart of the claim" (such as misstatements

⁶ The AG's decision holds that an applicant whose spouse has been subjected to a coercive family planning practice must show in order to be granted asylum that he "(i) resisted China's coercive population program, (ii) suffered or has a well-founded fear that he will suffer 'persecution' by the Chinese government and (iii) can show that such persecution was inflicted or that he has a well-founded fear that it will be inflicted 'on account of' his resistance." *Matter of J-S*, 24 I&N Dec. at 542. (Footnote continued on next page).

The AG did not find under the facts of the case as he reported them that the respondent could meet this test. "The respondent said he was at home when the officials forcibly removed his wife in order to insert the IUD but that 'he did not want to interfere...'" (at 524). There was also a "fine for having married below the age" as well as threats of forced sterilization "as they had allegedly sterilized respondent's sister and mother" for their violations of the family planning practices. *Id.* Again, the AG's decision is in conflict with established Ninth Circuit precedent even under the facts as he reported them. For example, in *Zhang*, while the court did not accept the "automatic" grant of relief to a child whose parent had been sterilized; it still reversed a denial of relief on the respondent's claim of suffering "economic deprivation, denial of access to education and violence directed at her father in her presence." 408 F.3d at 1247. Additionally, "acts of violence committed against an applicant's friends or family can establish a well-founded fear of persecution." *Id.* at 1249 (citing *Nagoulko v. INS*, 333 F.3d 1012, 1017 (9th Cir. 2003) and *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998)). See also *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc) (reversing a denial of relief to a woman who was obligated to undergo a "forced pregnancy examination" and finding that even without any further claim of physical assault, such an examination constituted "past persecution").

The Attorney General's decision in *Matter of J-S* was accepted in *Yu v. Att'y Gen.*, 568 F.3d 1328 (11th Cir. 2009) and *Jin v. Holder*, 572 F.3d 392 (7th Cir. 2009). The Eleventh circuit cites with approval *Lin-Zheng v. Att'y Gen.*, 557 F.3d 147, 156-57 (3d Cir. 2009) (en banc) and *Lin v. Dep't of Justice*, 494 F.3d 296, 314 (2d cir. 2007) (en banc) (upon which the AG's decision was primarily based).

⁷ In comparison to other circuits, this Ninth Circuit decision takes a far more generous interpretation of the phrase "other resistance" in the context of opposing coercive family planning practice. Here, the circuit found such on the basis of a continued effort by a couple to cohabit and marry despite being denied an official marriage license, let alone other information of record.

as to dates), citing *Li v. Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004). The petitioners claimed to be members of a “house church” of the “Christian” faith who assisted North Koreans who had illegally entered China and who were consequently persecuted for providing “humanitarian assistance” in violation of Chinese law. The mistreatment was from both Chinese police as well as other prisoners in a labor camp where they were sentenced. WARDLAW.

Due Process/Translation. “We have held that an asylum applicant has a due process right to be given competent interpretation services if he does not speak English,” citing *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003) and *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000). “Even where there is no due process violation, faulty or unreliable translation can undermine the evidence on which an adverse credibility determination is based. *He v. Ashcroft*, 328 F.3d at 598; *Kebede v. Ashcroft*, 366 F.3d 808 (9th Cir. 2004); *Mendoza v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003).

Unable or Unwilling to Control/Private Agent, China (2009). The court held that “the police were either unable or unwilling to control the beatings of Li by his fellow inmates” after finding past persecution from the beatings by other inmates, citing *Avetova v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000). “Affirmative state action is not necessary to establish a well-founded fear of persecution if the government is unable or unwilling to control those elements of its society responsible for targeting a particular individual.”

Persecution/Prosecution, Not Affirmed, China (2009). In finding persecution, the court discussed how persecution arises where “the prosecution lacks legitimacy or proceeds without the process normally due” or is “disproportionately severed” or is directed at a “disfavored group.” The court cited *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000), which found that a prosecution related to “interfaith dating” was persecution because of the significant physical punishment, notwithstanding the violation of local criminal law.

Political Opinion/Imputed, Found, China (2009)/Actions Not Words. “One who is persecuted for protesting with lawful deeds is just as worthy of asylum under our laws as one who protested with words.” Hence, the fact that there was no criticism of the government’s policy that “undocumented North Korean refugees should receive no aid” was found not to bar the claim based on imputed political opinion.

Credibility - Pre-REAL ID/IJ Speculation, Not Affirmed, China (2009). One of the IJ’s bases for making an adverse credibility determination was Li’s failure to know the “difference between the teachings of the Presbyterian church that he attends in Los Angeles and the teachings of the church in his hometown.” The court rejected this basis, stating that “what a new Christian convert would know (or even could know) about theological positions of various denominations is pure conjecture.”

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- * *Zhao v. Mukasey*, 540 F.3d 1027 (9th Cir. 2008) ((b) (6)); reversing and remanding a denial of relief to practitioners of Falun Gong. Respondents claimed both physical mistreatment and being subjected to threats. They were denied relief on the bases that they had not established sufficiently severe mistreatment to have demonstrated past persecution nor a well-founded fear of future risk. Credibility was not at issue. They had been able to legally leave China on the basis of official government issued travel

documents and fellow practitioners who had been arrested with them had been able to continue to live in China without any particular problem. REINHARDT.

Religion/Falun Gong. The court cited to *Zhang v. Ashcroft*, 388 F.3d 713 (9th Cir. 2004) and *Zhou v. Gonzales*, 437 F.3d 860 (9th Cir. 2006) for the principle that any Falun Gong practitioner who continues to maintain his participation and who has had problems in the past with authorities has a well-founded fear of future persecution on the basis of religious beliefs.

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- ✱ *Zhu v. Mukasey*, 537 F.3d 1034 (9th Cir. 2008) (b) (6)); reversing and remanding on credibility grounds and whether the misconduct was “on account of” a protected criteria. Respondent has been raped at work by “the factory manager who also held a political position.” She sought to complain about this to local officials and she was then harassed and threatened with arrest by local officials. The IJ found her to be incredible because of inconsistencies in the record as well as a claim of being “implausible.” This last position was rejected as impermissible “speculation” by the IJ. POLLAK.

Credibility/Airport Interview. The effort to justify the adverse credibility determination based on inconsistencies from an “airport interview” was rejected. This was so even with Respondent having omitted all of the information pertaining to the rape as well as the reported efforts to arrest her after she reportedly complained to local governmental officials. *Li v. Ashcroft*, 378 F.3d 959, 962-63 (9th Cir. 2004) was cited for: “[S]tatements given during airport interviews [are not] valuable impeachment sources because of the conditions upon which they are taken and because a newly arriving alien cannot be expected to divulge every detail...” (at 1040).

Nexus/Retribution, On Account of Protected Ground, China (2008); Political Opinion/Found, China (2008). The court cited to *Sagaydak v. Gonzales*, 405 F.3d 1035, 1042 (9th Cir. 2005) for the proposition that, “A victim who is targeted for exposing government corruption is persecuted on account of political opinion because retaliation for investigating or publicizing corruption by political figures is by its very nature a political act.” (at 1043) (internal quotation marks and citations omitted). The court found this was not a mere personal dispute between Respondent and the factory manager.

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- ✱ *Chen v. Mukasey*, 527 F.3d 935 (9th Cir. 2008) (b) (6)); remanding on the basis of whether the BIA would choose to accept the panel’s determination that the withdrawal of a Form I-589, Application for Asylum and for Withholding of Removal, did not preclude the finding that the application was “frivolous.” TROTT.⁸

Asylum Application/Frivolous, Found, China (2008). “Chen admitted that the contents of her asylum application were false, that the information she provided to an asylum officer in an April 1999 interview was false, and that the marriage and birth certificates she provided to the asylum officer were false.” (at 936). Because she subsequently developed another form of relief in the form of an I-130, she withdrew the I-589 prior to any hearing thereon. The court found

⁸ On remand the Board published a decision, *Matter of X-M-C-*, 25 I & N Dec. 322 (BIA 2010), finding that a frivolous determination could be made resulting in the denial of any further immigration benefit even if the application was withdrawn prior to EOIR making a substantive decision.

that because she had been explicitly warned of the consequences of filing a frivolous I-589, the fact that there was no evidentiary hearing thereon before the IJ did not preclude the finding. The court expressed its agreement with *Lazar v. Gonzales*, 500 F.3d 469 (6th Cir. 2007), which reached a similar result. However, it further noted *Zheng v. Mukasey*, 514 F.3d 176 (2d Cir. 2008), where there was a different result with regard to whether there was “ambiguity” at the pertinent provision of INA § 208(d)(6). (at 942). The majority, over the disagreement of CLIFTON, remanded the case to the Board notwithstanding it specifically finding no such “ambiguity.” This was done “to allow the agency itself to speak to this issue and to attempt to avoid making a decision later undercut by a different interpretation by the BIA in *Zheng*.” (at 943).

- ✱ *Huang v. Mukasey*, 520 F.3d 1006 (9th Cir. 2008) (b) (6); reversing and remanding a denial for failure to “make a credible finding.” PER CURIAM.

Credibility - Pre-REAL ID/Explicit Finding Required, China (2008). The IJ found “numerous, significant inconsistencies” in the claim. (at 1007). “The IJ conflated what he may have intended as an adverse credibility finding...[with a further finding] that he has failed to discharge his burden” in terms of the relief he sought. *Id.* The court emphasized that the two principles had to be addressed separately.

- ✱ *Tang v. Gonzales*, 489 F.3d 987 (9th Cir. 2007) (b) (6); reversing and remanding a denial of asylum. A woman became pregnant. Her claim was not before the court but that of her husband was. Her employer (as opposed to government officers), per its “policy,” took her to a clinic for a “forced abortion.” She “cried and screamed but it didn’t help,” nor did she “go into hiding” with regard to expressing any particular opposition; W. FLETCHER.

Persecution/Forced Abortion. The court applied its holding in *Ding v. Ashcroft*, 387 F.3d 1131 (9th Cir. 2004), that “[a]n asylum applicant need not demonstrate that she was physically restrained during an abortion procedure to show that it was forced.” *Tang*, 490 at 990 (citing *Ding*, 387 F.3d at 1139). The court rejected the IJ’s reasons for finding that the abortion was not forced, including the fact that neither Tang nor his wife went into hiding to avoid the abortion, and that the procedure was by the private employer rather than pursuant to any official summons. *Id.* at 991.

Persecution/Of Family/CPC, China (2007). “In *Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. 2005), we held that victims of forced sterilization were ‘entitled, without more, to withholding of removal.’ “We conclude that, like those who have undergone forced sterilization, victims of forced abortion are ‘entitled by virtue of that fact alone’ to withholding of removal [W]e hold that Tang, as the partner of a woman who had a forced abortion, is entitled to withholding of removal as a matter of law.” *Tang*, 489 F.3d at 992.

- ✱ *Lin v. Gonzales*, 472 F.3d 1131 (9th Cir. 2007) (b) (6); reversing and remanding a denial of asylum. The court found that there had been “other resistance” under INA § 101(a)(42)(B) to a coercive population control program, as discussed by *Li v. Ashcroft*, 356

F.3d 1153 (9th Cir. 2004) (en banc). The court had previously reversed and remanded to the BIA on an administrative denial for failure to provide corroborating evidence. Upon remand, the Board again denied relief. Mr. Lin claimed that he had been beaten because he interfered with birth control officials who were endeavoring to seize and destroy household furnishings belonging to respondent's brother and his wife who had violated birth control policies; TROTT.

Political Opinion/Opposition to CPC. The Board believed that "an applicant does not satisfy the resistance component unless the applicant can demonstrate that the resistance was motivated by a disapproval of birth control policies." The Ninth Circuit found Mr. Lin's position, that he met the resistance component "simply by physically interfering with birth control officials while the officials destroyed family property in accordance with birth control policies," to be persuasive. The court held that the simple physical act of resistance, coupled with the respondent's assertion that he disagreed with the birth control policies, was sufficient to grant relief.

- ✱ *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007) (b) (6); reversing a denial of a motion to reopen with regard to an asylum claim; The respondent previously had an asylum application denied. In doing so, the IJ made a finding that the application was frivolous and that respondent "was therefore barred forever from seeking any type of immigration relief." The respondent did not appeal this decision and was removed to China. He thereafter illegally returned. He filed a motion to reopen based on "changed circumstances." In affirming the IJ's denial of the motion to reopen, the BIA held that the respondent was "permanently ineligible for any benefits under the Act," citing section 208(d)(6); SMITH.

Motion to Reopen/Departure from the U.S. Interpreting 8 C.F.R. 1003.23(b)(1), which states that a motion to reopen "shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States," the court held that this applies only to those who depart the U.S. during currently pending removal proceedings. The respondent by contrast, was removed to China after his removal proceedings were complete, and so the bar did not apply to him.

Regulations/Construction Of; Ambiguity in Favor of Alien. "While the regulation may have been intended to preclude aliens in petitioner's situation from filing motions to reopen their removal proceedings, the language of the regulation does not unambiguously support this result. Because ambiguity must be construed in favor of the petitioner, we decline to adopt the government's construction of the regulation . . ."

Removal Order/Reinstatement Of. Both the BIA and the IJ found that they lacked jurisdiction because "the original deportation order had been automatically reinstated by operation of law upon the petitioner's illegal reentry into the U.S." The court held that the statute specified a number of steps that the government must take before the order can be reinstated. Therefore, the Board's conclusion that it lacked jurisdiction was error.

- ✱ *Lin v. Gonzales*, 434 F.3d 1158 (9th Cir. 2006) (b) (6)); reversing an adverse credibility finding, finding past persecution, and remanding for a discretionary consideration of asylum; McKEOWN.⁹

Persecution/Forced Sterilization. “If Lin can prove that his wife was forcibly sterilized he is automatically eligible for asylum and withholding of removal.” Following: *Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. 2005) and *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003).

Credibility - Pre-REAL ID/State Department Reports, Reliance On Rejected, China (2006); IJ Speculation, Not Affirmed, China (2006). The respondent submitted a series of “official” documents from Chinese public authorities to support his claim. They had omissions and inconsistencies. There was in the record the Dept. of State Report which expresses “skepticism” as to the bona fides of these types of documents. The IJ relied on this to discount the probative value to be accorded to them. The court rejected this assessment. It held there rather need be “actual evidence rather than personal speculation by the IJ.” The references to the Dept. of State Report were explicitly held not to meet that standard.

Discretion/Administrative Exercise Of, Not Upheld, China (2006). “Asylum is rarely denied as a matter of discretion.”

- ✱ *Zhou v. Gonzales*, 437 F.3d 860 (9th Cir. 2006) (b) (6)); reversing and remanding an adverse credibility finding on the basis of being an imputed supporter of a Falun Gong practitioner. The respondent did not make any claim that she had in fact been mistreated or arrested. Rather, she asserted that she had brought into China on a previous trip articles

⁹ *Berhane v. Holder*, 606 F.3d 819 (6th Cir. 2010) did not accept the Board’s act of “discretion” with regard to finding Mr. Berhane ineligible for asylum on that basis that “throwing rocks at police during anti-government demonstrations amounts to a political crime, which permits him to seek asylum as opposed to a ‘serious non-political crime which bars him. . . . 8 U.S.C. 1158(b)(2)(A)(iii) and (3)(B)(iii).” The decision discusses the pertinent case law, including *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (participating in general rioting and destruction of civilian property during demonstrations); *Chay-Velasquez v. Ashcroft*, 367 F.3d 751 (8th Cir. 2004) (petitioner was a member of a student group that broke windows on government buildings, marched and fought with the police, and burned civilian buses); *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986) (petitioner took part in bombings, trained fellow paramilitants, and organized illegal arms shipments while part of the Provisional Irish Republican Army); *Efe v. Ashcroft*, 293 F.3d 899 (5th Cir. 2002) (petitioner left a political demonstration, retrieved a knife from his home, returned to the demonstration, and murdered a police officer there); *Guo Qi Wang v. Holder*, 583 F.3d 86 (2d Cir. 2009) (petitioner extracted organs and tissue from executed prisoners in China and once removed skin from a person who was still alive). These decisions all upheld the bar. The circuit stated that “Berhane’s rock throwing was prolific (he participated in 20 such demonstrations) and dangerous (the demonstrators ‘probably’ injured police officers).” The circuit remanded because the Board did not explain “why he falls on the wrong side of the line - if indeed he does. And that is particularly true given the prevalence of rock throwing as a form of street protest.” The decision suggests that magnitude of the misconduct here was a good deal less than circumstances where the bar was upheld. The concurrence indicates that on remand, the Board should “weigh heavily in the balance that much of Berhane’s rock-throwing can be attributed to self-defense.” Further, the Board must consider the government’s general human rights policies, explaining that “pro-democracy youths who throw rocks at a repressive regime’s security forces are not the type of criminals Congress intends to keep out through its statutory bar for serious nonpolitical crimes.”

about Falun Gong that she gave a friend and that she knew it was not proper to do so. She asserted, and provided expert testimony as well as documents, that the police had searched her residence and that she had been advised by family members that the police were looking to arrest her. THOMPSON.

Credibility - Pre-REAL ID/Implausibility, Not Affirmed, China (2006); IJ Speculation, Not Affirmed, China (2006). “Underpinning the IJ’s finding that Zhou was incredible was his opinion that it was ‘implausible’ that Zhou ‘would risk her privileged position in Chinese society, her excellent job as director of administration, her opportunity to work abroad in Singapore, and her freedom, all just to provide a mere acquaintance with the favor of illegal material.” This assertion was dismissed as unwarranted “speculation.” Other inconsistencies cited by the IJ in the documents were dismissed as unacceptable as was the failure to provide sufficient corroboration citing to *Sidhu v. INS*, 220 F.3d 1085, 1091-92 (9th Cir. 2000).

Religion/Falun Gong. The court reiterated its holding in *Zhang v. Ashcroft*, 388 F.3d 713 (9th Cir. 2004) in terms of its view as to how easy it is for a citizen of China who fears persecution on the basis of an association with Falun Gong to establish the objective component of the claim. “Although there is no indication that the Chinese government believes that Zhou actually practices Falun Gong, there is no reason to believe that this will mitigate the harshness of her sanctions or detention for importing and distributing Falun Gong articles.” As it, “perceives Zhou’s actions as a threat to its political power.”

Withholding of Removal/Granted, China (2006). The court found that the “‘clear probability’ of these consequences compels the conclusion that Zhou is entitled to withholding of removal.” However, the court upheld a denial of relief under CAT. It again approvingly and consistently referred to Zhang: “Although the evidence in the record compels a finding that it is more likely than not that Zhang will be *persecuted* upon return to China, the likelihood of future harm amounting to torture is less pronounced. We cannot say on this record that the evidence compels us to find that Zhang meets the clear probability standard.”

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- * *Quan v. Gonzales*, 428 F.3d 883 (9th Cir. 2005) (b) (6)); reversing an adverse credibility finding, finding past persecution, and remanding for a discretionary determination of asylum. An individual claimed physical mistreatment, arrest for less than a day, and firing by employer due to participation in unregistered Christian “house church.” WHALEY (O’SANNLAIN, dissenting).

Persecution/Medical Attention. The fact that the respondent did not claim any need for medical attention did not defeat this finding. *Contra Guo v. Ashcroft*, 361 F.3d 1194, 1199 (9th Cir. 2004), as noted by the dissent; *Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1995).

Credibility - Pre-REAL ID/Inconsistencies, Minor, Not Affirmed, China (2005). The six inconsistencies cited by the Immigration Judge were found either in fact not to be present or otherwise not supported by “substantial evidence.”

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- * *Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005) (b) (6)); upholding denial of withholding but remanding for discretionary consideration of asylum, even though there

was no claim of any physical violence or threats to petitioner, holding that “a child of a forcibly sterilized parent is not automatically eligible for asylum;” *W. FLETCHER*.

Persecution/Economic, Not Affirmed, China (2005). Alien testified “her parents’s [sic] resistance to China’s coercive population control program caused a number of adverse economic consequences. ... As a result of the family’s inability to pay the fine, Ms. Zhang was barred from attending school. Denial of access to educational opportunities available to others on account of a protected ground can constitute persecution.” (at 1247–48, citing *Bucur v. INS*, 109 F.3d 399, 403 (7th Cir. 1997)).

Persecution/Of Family, Not Affirmed, China (2005). Notwithstanding “the lack of specific threats against Ms. Zhang, ... ‘acts of violence committed against an applicant’s friends or family can establish well-founded fear of persecution.’” 408 F.3d at 1249 (quoting *Nagoulko v. INS*, 333 F.3d 1012, 1017 (9th Cir. 2003)).

Withholding of Removal/Denied, China (2005). Although the court remanded for a consideration of “whether the trauma Ms. Zhang suffered as a result of her father’s forcible removal and sterilization, the economic deprivation she experienced, and her inability to pursue an education, when taken together, constituted persecution,” *Id.* at 1249, by finding no basis for withholding of removal, the court was denying the alien suffered past persecution that would have given rise to a presumption of a well-founded fear of future persecution. *Id.* (citing *Al-Harbi v. INS*, 242 F.3d 882, 888–89 (9th Cir. 2001) for the rule that the standard for withholding of removal is “more stringent than the well-founded fear standard governing asylum” is irrelevant, and this panel misapplied the past-persecution analysis for withholding claims).

✱ *Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. 2005) ((b) (6)); reversing BIA’s denial of withholding and remanding; REINHARDT.

Persecution/Of Family/CPC, China (2005). Just as a husband is statutorily eligible for asylum solely by virtue of the fact that his wife has been involuntarily sterilized pursuant to a coercive population control program, he is also entitled, without more, to withholding of removal. He need make no further showing or meet any further conditions nor requirements in order to obtain such relief.

Persecution/Forced Sterilization. “[O]ne who has suffered involuntary sterilization, either directly or because of the sterilization of a spouse, is entitled, without more, to withholding of removal.” (at 1203).

✱ *Zheng v. Ashcroft*, 397 F.3d 1139 (9th Cir. 2005) ((b) (6)) (amending 382 F.3d 993); reversing IJ’s credibility determination and remanding for a discretionary grant of asylum; FISHER; declined to extend by *Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. Mar. 8, 2005).

Credibility - Pre-REAL ID/Inconsistencies, Minor, Not Affirmed, China (2005). A discrepancy of two hours between alien’s testimony and his wife’s written statement as to when birth control officials took his wife away cannot support an adverse credibility finding.

Political Opinion/Opposition to CPC. China’s family planning policy is not uniform across the country, but varies from region to region based on local regulation. “[R]egardless of what the

official policy may be in a particular township regarding the number of children a couple is allowed to have, it is possible that corrupt officials may deviate from that policy and force a couple to abort their child even if the couple has not surpassed the legally permissible number of children.”

Credibility - Pre-REAL ID/State Department Reports, Reliance On Permitted, China (2005).

The State Department’s reports may be considered when evaluating an applicant’s credibility, but may only be used as supplemental evidence to discredit generalized statements made by the applicant, not to discredit specific testimony regarding individual experience. *See Duarte de Guinac v. INS*, 179 F.3d 1156, 1162 (9th Cir. 1999); *Chebchoub v. INS*, 257 F.3d 1038, 1043–44 (9th Cir. 2001). “The IJ, however, may not discredit a petitioner’s testimony based on a statement in a State Department report that is itself based on speculation or conjecture. *See Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000).”

- * *Zhang v. Ashcroft*, 388 F.3d 713 (9th Cir. 2004) (b) (6); granting withholding and denying CAT; SCHROEDER, GOODWIN, and TASHIMA.

Persecution/Of Family, Not Affirmed, China (2004). Persecution of alien’s family in China for their involvement in Falun Gong activities is compelling evidence that alien would face similar mistreatment, where alien introduced his family to Falun Gong, his brother was arrested and sentenced to a reeducation-through-labor camp and his parents were arrested and forced to write self-criticism letters. (at 718).

Well-Founded Fear/Individualized Risk, Not Affirmed, China (2004). Evidence of continuing interest in alien and his family, including blaming him for distributing anti-government materials and warning his parents that he must report to the police upon his return to China, increases the likelihood of future persecution. (at 719).

Religion/Falun Gong. Persecution of Falun Gong practitioners by the Chinese government constitutes persecution on account of religious beliefs and political opinions, despite the fact the Falun Gong movement adamantly denies being a religion or a political party. (at 720–21).

- * *Ding v. Ashcroft*, 387 F.3d 1131 (9th Cir. 2004) (b) (6); reversing IJ’s credibility determination and finding the alien necessarily eligible for asylum; WARDLAW.

Persecution/Forced Abortion. The lack of physical restraints during the abortion procedure does not support a finding that the abortion was voluntary, when physical force was exercised to take the alien to the hospital and birth control unit supervisors forced her on to the operating table and stood at her side during the procedure. (at 1137–38). “[A]n applicant does not need to provide evidence of physical restraint to establish the forced nature of an abortion.” (at 1139). Subsequent to this decision, the Board of Immigration Appeals held that “[a]n abortion is not ‘forced’ within the meaning of the refugee definition ... unless the threatened harm for refusal would, if carried out, be sufficiently severe that it amounts to persecution.” *Matter of T-Z-*, 24 I&N Dec. 163, 169 (BIA 2007). The Board disagreed with *Ding* to the extent that it suggests that “threats of economic harm that do not rise to the level of persecution, if carried out, would suffice to demonstrate that an abortion was ‘forced’ within the meaning of the statute.” *Id.*

Evidence/Authentication, Inability To, Not Affirmed. “The exclusion of documents because [they have not been authenticated] runs contrary to our long-standing principle excusing such authentication” *Id.* at 1135 n.4.

- * *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004), *amending and superseding* 356 F.3d 1027 (9th Cir. 2004) (b) (6); denying a petition for further rehearing and rehearing en banc and reversing and remanding a denial of a motion to reopen to allow the respondent to further pursue an application for asylum. At the time of the hearing, the respondent was fourteen-years-old. He was represented by counsel. Lin’s mother bore a second child in violation of a coercive family planning practice. The mother was reportedly sterilized. The court found ineffective assistance of counsel and a prima facie meritorious claim. B.FLETCHER.

Ineffective Assistance/Minors. In discussing standards for effective legal representation of asylum seekers, “our concern about their proper implementation is intensified when the petitioner is a minor.” 377 F.3d at 1025.

Particular Social Group/Family, Not Affirmed, China (2004). “We recognize that a family is a social group.” (at 1028). “The expanded record suggests that the Chinese government was inclined to go to extraordinary lengths to punish Lin’s family... Lin was separated from his parents as a result of government activity...that he was threatened personally when his mother’s house was ransacked...” (at 1029).

Matter of C-Y-Z- as a Basis for Relief. “Aside from Lin’s membership in his nuclear family, the particular basis of his family’s persecution may justify his refugee status. Congress has made plain that the forced sterilization of Zheng [the mother] constitutes persecution.” (at 1030). “Zheng’s forced sterilization...can be imputed to Lin’s father, whose reproductive opportunities the law considers bound up with his wife.” *Id.* (citing *He v. Ashcroft*, 328 F.3d 593, 604. (9th Cir. 2003)). “His mother’s misfortune is seemed to be past persecution on account of political opinion; this is in turn imputed to Lin’s father as a matter of law, whether or not he had ever actually expressed such an opinion or experienced such persecution directly.” (at 1034).

Ineffective Assistance/Standard. “[T]he presentation of a few bare facts, without documentation and without the factual context that gives them meaning or the analytical context that gives them their power, does not suffice to place the critical issues squarely before the tribunal that must consider them.” (at 1029).

Persecution/Discrimination, Of Children/CPC. “The discrimination or abusive treatment of children in families with more than one child may qualify them for refugee status.” (at 1031).

- * *Ge v. Ashcroft*, 367 F.3d 1121 (9th Cir. 2004) (b) (6); reversing IJ’s adverse credibility determination and remanding for a discretionary grant of asylum based on petitioner’s wife’s forced abortion; BEEZER; *declined to extend by* *Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. Mar. 8, 2005).

Credibility - Pre-REAL ID/IJ Speculation, Not Affirmed, China (2004). Conjecture regarding how the Chinese government should have taken action against petitioner and his wife for violating the one child policy cannot form the basis of an adverse credibility determination.

Conjecture by the IJ included statements such as: “if the government was so concerned about the respondent’s violation of the one-child policy, they [sic] surely would have taken [employment] action against respondent at the time [of the first unauthorized pregnancy.]”

Evidence/Authentication, Inability To, Not Affirmed; Credibility/State Department Reports, Reliance On Rejected, China (2004). Despite the State Department’s report that some asylum applicants fraudulently present abortion certificates, it cannot be presumed that a hospital record submitted to prove that the forced abortion occurred is fraudulent. (at 1126).

- * *Chen v. Ashcroft*, 362 F.3d 611 (9th Cir. 2004) ((b) (6)); reversing IJ’s adverse credibility determination; ALARCON.

Credibility - Pre-REAL ID/Opportunity to Explain. Although the IJ questioned petitioner as to why she never requested official permission for her first pregnancy and received unsatisfactory excuses, by moving on to another subject the IJ denied her a reasonable opportunity to explain, “leaving this court to speculate whether Mrs. Chen did not fully understand the nature of the question due to the difficulties of translation, or whether she had feared that a fine would be assessed immediately, or worse, that she would have been required to abort her child.” (at 618).

Credibility - Pre-REAL ID/IJ Speculation, Not Affirmed, China (2004). Speculation regarding the religious activities of petitioner’s husband cannot form the basis of an adverse credibility determination; even if the finding were not based on speculation, the issue is not central to a claim of persecution based on coercive population control. “Additionally, if [petitioner]’s alleged evasiveness with regard to her husband’s activities ‘cannot be viewed as attempts by the applicant to enhance [her] claims of persecution, [they] have no bearing on credibility.’ *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000).” (at 620).

- * *Guo v. Ashcroft*, 361 F.3d 1194 (9th Cir. 2004) ((b) (6)); reversing IJ’s adverse credibility determination, finding that prior detention constituted persecution on account of religion, and remanding for a discretionary grant of asylum; ALARCON.

Credibility - Pre-REAL ID/Opportunity to Explain. Unclear testimony, such as the testimony here regarding whether petitioner became a Christian in China or after his arrival in the United States may not serve as substantial evidence for an adverse credibility finding when the applicant is not given the chance to attempt to clarify his testimony. (at 1200).

Credibility - Pre-REAL ID/Inconsistencies, Minor, Not Affirmed, China (2004). Petitioner’s inability to remember the name of the company he had written on his B-1 visa application was an inconsistency that does not go to the heart of his asylum claim and cannot justify an adverse credibility finding. (at 1201).

Credibility - Pre-REAL ID/Misrepresentations. Making misrepresentations on an application to extend nonimmigrant status is consistent with a fear of deportation and cannot be a basis for refusing refugee status. (at 1202).

Persecution/Detention, Not Affirmed, China (2004); Religion/Chinese Christian. Detention for a day and a half – during which alien was hit in the face, kicked in the stomach, and forced to sign a renouncement of Christianity – compels a finding that he was persecuted because of his religious beliefs. (at 1203). Alien’s attempt to stop Chinese police from taking down a cross

from a tomb during a funeral was resistance to discriminatory government action, which led to being beaten and detained for fifteen days. This treatment rises to the level of persecution on account of his religion. (at 1203).

- ✱ *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (b) (6)); remanding based on finding that INA § 101(a)(42)(B) applies to husbands whose marriages would be legally recognized, but for China's coercive family planning policies, and not only to husbands whose marriages are recognized by Chinese authorities; REINHARDT.

Persecution/Of Family/CPC, China (2004). Limiting asylum eligibility to spouses whose marriage was officially recognized and excluding husbands who marry their spouses prior to the age authorized by the Chinese policy contravenes the purpose and policies of the statutory amendment. (at 560). "While ordinarily we respect the marriage rules and regulations of foreign nations, including the establishment of a minimum age, ... here the entire purpose of Congress's amendment to the asylum statute is to give relief to victims of China's oppressive population control policy." (at 561).

- ✱ *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (b) (6)); *en banc reh'g* of 312 F.3d 1094 (2002); interpreting the phrase "other resistance to a coercive population control program" and remanding; HAWKINS; (KLEINFELD, dissenting, urged the court to defer to the BIA: "Our court is not in a position to change the ideology of the Communist Party of China, nor to afford a safe harbor to all those Chinese who chafe under it."); *declined to extend by Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. Mar. 8, 2005).¹⁰

Persecution/Forced Pregnancy Exam. Forced pregnancy examination, without any further claim of physical assault, by four birth control officials soon after alien expressed her defiance against China's early marriage and pregnancy laws was for the purpose of intimidation, not legitimate medical practice, and rose to the level of persecution. (at 1158). This was so even without any claim of subsequent adverse health effects.

Political Opinion/Opposition to CPC. China's early marriage policy is an integral part of the population control policy; however, the court was "not presented with the question of whether

¹⁰ The issue of "other resistance" to Chinese coercive family planning practices was discussed in *Matter of M-F-W-*, 24 I&N Dec. 633 (BIA 2008). It squarely holds that the routine unwanted implanting and/or removal of an IUD would not constitute such. It cites *Li*, but may be inconsistent therewith. The decision does not distinguish or even cite *Lin v. Gonzales*, 472 F.3d 1131 (9th Cir. 2007) where in another "other resistance" case the court reversed a denial of asylum where it felt that physical interference would constitute such while property in the home of another non-compliant was destroyed. In *M-F-W-*, the Board held that a claim for relief was not made out even though "resistance" had been demonstrated on the basis that respondent had been detained for three days when she refused to have an IUD inserted. 24 I&N Dec. at 644. Relief was denied in that this was not found to constitute "past persecution" as "she was not beaten or injured." The Board found her experiences constituted "discomfort" and that she had otherwise been subjected to "the routine implementation of China's family planning policy." *Id.* *Huang v. Holder*, 591 F.3d 124 (2d Cir. 2010) generally accepts *Matter of M-F-W-*. However, it did not substantively deal with the issue of whether the forcible injection of the IUD and mandatory physical exams would constitute "other resistance" under section 101(a)(42) of the INA.

resistance to the marriage-age aspect of the program alone would satisfy the statutory standard.” (at 1159). Alien demonstrated resistance to the coercive population control program by telling officials she wanted “freedom for being in love,” announcing her decision to marry even after a license was refused, telling officials she intended “to have many babies” and didn’t want them to interfere, and by kicking and struggling when forced to undergo a gynecological examination (at 1160).

- * **Wang v. Ashcroft, 341 F.3d 1015 (9th Cir. 2003)** (b) (6); (1) applicant established past persecution based upon force abortions and insertion of IUD; (2) INS failed to rebut such presumption; (3) adverse credibility determinations of BIA and IJ were not supported by substantial evidence; (4) applicant was eligible for withholding of removal; and (5) reversal, rather than remand for determination of eligibility by BIA, was appropriate. Petition granted; vacated and remanded; B.FLETCHER; *distinguished by Chen v. Ashcroft*, 362 F.3d 611 (9th Cir. 2004).

Persecution/Forced Abortion. Asylum applicant established past persecution by providing evidence that both times that she became pregnant after having her first child, Chinese government, pursuant to its one-child policy, harassed her by deducting from her wages, threatening her job stability, or threatening to impose unreasonably high fines, thus forcing her to have two abortions and accept insertion of intrauterine contraceptive device (IUD). Subsequent to this decision, the Board of Immigration Appeals held that “[a]n abortion is not ‘forced’ within the meaning of the refugee definition ... unless the threatened harm for refusal would, if carried out, be sufficiently severe that it amounts to persecution.” *Matter of T-Z-*, 24 I&N Dec. 163, 169 (BIA 2007). The Board disagreed with *Wang* to the extent that it suggests that “threats of economic harm that do not rise to the level of persecution, if carried out, would suffice to demonstrate that an abortion was ‘forced’ within the meaning of the statute.” *Id.*

Credibility - Pre-REAL ID/Inconsistencies, Minor, Not Affirmed, China (2003). Adverse credibility determinations of BIA and IJ, based on inconsistencies in testimony between Chinese asylum applicant and her husband regarding such things as date of forced abortion and husband’s normal work hours at time of abortion, were not supported by substantial evidence, inasmuch as inconsistencies were not material to whether applicant was forced to have abortions.

Asylum Application/Granted to Family Member. The court greeted with incredulity the argument made by the government that a reviewing court should not concern itself with administrative inconsistencies where the applicant was denied, but her husband’s case was granted on the basis of her experiences.

- * **Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003)** (b) (6); holding that in order for government official to “acquiesce” in acts of torture by private party, as required for the threat of such torture by individuals not themselves associated with foreign government to provide basis for grant of relief from removal under CAT, public official need not have actual knowledge of, or willfully accept, the torture. Petition granted; order vacated; case remanded; PREGERSON.

CAT/Acquiescence, Not Affirmed, China (2003). For government official to “acquiesce” in acts of torture by private party, public official need not have actual knowledge of, or willfully accept, the torture; rather, such “acquiescence” requires only that public official, prior to the activity constituting torture, have an awareness of such activity, whether that awareness takes form of actual knowledge or willful blindness, and thereafter breach his legal responsibility to intervene to prevent such activity. The correct inquiry, in deciding whether illegal Chinese immigrant was entitled to CAT relief based on his reasonable fear of torture, not by government officials themselves, but by private individuals who had smuggled him out of country and against whom he had testified, was whether alien could show that public officials demonstrate “willful blindness” to the torture of their citizens by smugglers, i.e., whether they would turn blind eye to torture.

- ✱ *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003) (b) (6); reversing IJ’s adverse credibility finding and remanding; *W.FLETCHER*; *declined to extend by Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. 2005); *distinguished by Chen v. Ashcroft*, 362 F.3d 611 (Mar. 30, 2004).

Credibility/Translation. Adverse credibility determinations of IJ and BIA, who disbelieved a Chinese national’s claim that his wife had been subjected to forced sterilization for violating China’s strict birth control policy, was not supported by reasonable, substantial and probative evidence; alleged problems with alien’s testimony, including fact that he had indicated that sterilization procedure was performed “a little while” after his and his wife’s arrival at hospital, were satisfactorily explained, inter alia, by IJ’s decision not to wait for a translator who was fluent in the alien’s native Chinese dialect and to instead proceed with aid of translator who spoke Mandarin, a language that alien had studied in school.

Colombia

Chronology

- ✖ *Cordoba v. Holder*, 726 F.3d 1106 (9th Cir. 2013)
- ✖ *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005)
- ✖ *Reyes-Guerrero v. INS*, 192 F.3d 1241 (9th Cir. 1999)
- ✖ *Campos-Sanchez v. INS*, 164 F.3d 448 (9th Cir. 1999)

✓ *Affirmed*

✖ *Not Affirmed*

- ✖ *Cordoba v. Holder*, 726 F.3d 1106 (9th Cir. 2013); This is a consolidated appeal involving citizens of Colombia and Mexico. The decision reversed and remanded denials of asylum and related relief. The applications had been denied on the basis that the proposed particular social groups (PSG) were not cognizable. The lead petitioner asserted in his claim: “he and his family were persecuted by the Revolutionary Armed Forces of Colombia (the “FARC”), because they are wealthy, educated landowners and businesspeople.” 726 F.3d at 1109. The second petitioner asserted that “he was abducted and held for ransom by members of a Mexican drug cartel because of his status as a landowner.” *Id.* at 1111. Credibility was not at issue. REINHARDT.

Particular Social Group/Landowners. “[B]oth Petitioners offered evidence suggesting that landowners in their respective countries are targets of persecution.” *Id.* at 1114. The decision expands upon *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc). “The social visibility inquiry cannot ‘require ‘on-sight’ visibility’” and “social visibility may be demonstrated by looking to perceptions of the persecutors,” which we held were “highly relevant to, or even potentially dispositive of, the question of social visibility.” 726 F.3d at 1115 (citing 707 F.3d at 1090).

Particular Social Group/Particularity. “In *Henriquez-Rivas*, the en banc court expressly rejected this line of cases [*Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 (9th Cir. 2010) (noting that “any person of any origin can be involuntarily placed” in the social group at issue); *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9th Cir. 1986)] as too narrowly defining what constitutes a particular social group.” 726 F.3d at 1116 (citing *Matter of C-A-*, 23 I&N Dec. 951, 959-60 (BIA 2006) (holding that land ownership is an “easily recognizable trait”).

Particular Social Group/Social Visibility. “[T]he government contended that even if landowners *per se* might . . . form a particular social group, the addition of *other* characteristics (e.g., ‘wealthy’ or ‘educated’ landowners) somehow invalidates the social group. We reject this contention.” 726 F.3d at 1117 (citing *Henriquez-Rivas*, 707 F.3d at 1090). “[T]he fact that those

individuals may have a variety of other characteristics, and belong to various *other* groups, would not be a bar to potential relief.” *Id.* (emphasis in the original).

CAT/Acquiescence, Not Affirmed, Mexico (2013). The Circuit reversed the denial of Respondents’ CAT claim. “The BIA rejected his CAT claim because it held that there was no proof that ‘the police were aware that he was being held captive or that they knew the men holding him.’” *Id.* at 1117 (citing *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013)). “[A]lthough the public official must have awareness of the torturous activity’ in order for an applicant to qualify for CAT relief, ‘he need not have actual knowledge of the *specific incident of torture.*” *Id.*

✱ ***Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005)**¹¹ (b) (6); upholding denial of asylum and withholding of removal, but remanding based on BIA’s incorrect “acquiescence” standard for CAT; Colombian businessman who defaulted on his business loans was pressured by his lenders, who were narco-traffickers, to participate in a money laundering scheme. Alien’s offer to give his house, car and business to pay off the loan was rejected, and fearing death, he and his wife fled to the United States. The court upheld the denial of asylum and withholding, finding that “business owners in Colombia who rejected demands by narco-traffickers to participate in illegal activity” was too broad to qualify as a particularized social group, and that there was no evidence of imputed political belief; B. FLETCHER.¹²

CAT/Acquiescence, Not Affirmed, Colombia (2003). The court, citing to *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003), again held that the standard set forth in *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000), which required “government officials to be ‘willfully accepting’ of the feared torturous activities,” had been “overruled.” Under Ninth Circuit law, “a petitioner need only prove the government is aware of a third party’s tortuous activity and does nothing to intervene to prevent it.” (at 1172). *Accord Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004) (homosexual from El Salvador granted CAT relief after being abused by private individuals).

Particular Social Group/Not Found, Colombia (2003). “A social group of business persons in Ochoa’s circumstances is too broad to qualify as a particularized social group. There is neither a voluntary relationship nor an innate characteristic to bond its members. ... There is no unifying relationship or characteristic to narrow this diverse and disconnected group.” (at 1171) (citing with approval *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)).

Political Opinion/Imputed, Not Found, Colombia (2005). “Here the petitioners’ claim is based on a theory of political neutrality, i.e. rejecting the narco-traffickers extortionate demands was an act of political neutrality. ... [T]he record provides no evidence that the narco-traffickers

¹¹ In *Gomez-Zuluaga v. U.S. Atty Gen.*, 527 F.3d 330 (3d Cir. 2008), the court found the BIA erred by not recognizing as a PSG “women who escaped involuntary servitude after being abducted and confined by the FARC.” The court extends its holding of *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) finding “child soldiers” to be a PSG.

¹² In *Hakim v. Holder*, 628 F.3d 151 (5th Cir. 2010) the court expressed its agreement with the *Ochoa* holding as well as *Amir v. Gonzales*, 467 F.3d 921 (6th Cir. 2006) that *Matter of S-V-* has been “overruled” and cannot be followed with regard to governmental “acquiescence.”

imputed political beliefs to Ochoa.” (at 1172, citing *Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997)).

- ✱ *Reyes-Guerrero v. INS*, 192 F.3d 1241 (9th Cir. 1999) ((b) (6)); holding: (1) death threats against prosecutor were on account of his political opinion, supporting claim of well-founded fear of future persecution, and (2) INS failed to rebut presumption of well-founded fear of future persecution; petition granted; B. FLETCHER.

Persecution/Threats, Not Affirmed, Colombia (1999). Death threats against Colombian prosecutor on behalf of criminal defendants charged with scheme to embezzle funds from government pension plan and divert it to political party were on account of prosecutor’s political opinion, supporting his claim for asylum based on well-founded fear of future persecution, where defendants were high-ranking members of their party, prosecutor was member of opposition party, prosecutor was told he would pay for damage done to defendants’ party, and death threats continued long after defendants were convicted.

Past Persecution/Failure to Rebut, Colombia (1999); Country Reports, Use Of Permitted, Colombia (1999). INS failed to rebut presumption that Colombian prosecutor had well-founded fear of future persecution, based on death threats on behalf of persons he had prosecuted, for purposes of asylum claim, inasmuch as 1994 State Department Country Profile for Colombia indicated that prosecutors had been assassinated and did not indicate any improvement, and letter from secretary-general of union of judicial employees included list of judges and judicial employees murdered since prosecutor fled.

- ✱ *Campos-Sanchez v. INS*, 164 F.3d 448 (9th Cir. 1999) ((b) (6)); reversed and remanded; REINHARDT; *declined to extend by Pal v. INS*, 204 F.3d 935 (9th Cir. 2000).

Credibility/Opportunity to Explain. When BIA decides an asylum case based on an independent, adverse credibility determination, contrary to that reached by IJ, it must, in order to comply with due process clause, give alien an opportunity to explain any alleged inconsistencies that it raises for the first time.

Evidence/Corroboration Not Required, Colombia (1999). Asylum applicant is encouraged but not required to provide corroborating documents in order to establish claim of well-founded fear of persecution.

Due Process/Notice of Adverse Credibility. BIA violated due process clause when, after IJ had found alien’s testimony credible but had denied asylum on other grounds, BIA affirmed denial on credibility grounds;

Congo (Democratic Republic of Congo)

Chronology

✖ *Kalubi v. Ashcroft*, 364 F.3d 1134 (9th Cir. 2004)

✓ *Affirmed*

✖ *Not Affirmed*

✖ *Kalubi v. Ashcroft*, 364 F.3d 1134 (9th Cir. 2004) (b) (6); reversing and remanding based on conclusion that if an asylum applicant's testimony on a particular issue is not found incredible for eligibility purposes, the testimony must be accepted as credible for exercises of discretion; Alien unsuccessfully applied for asylum in Canada; his application was denied because he was found to be a persecutor. RYMER.

Credibility/As Applied to Discretion. "[I]f an applicant's testimony on an issue is accepted for purposes of determining whether he is statutorily eligible for asylum, the same testimony must also be accepted for purposes of determining whether he is entitled to asylum as a discretionary matter." (at 1142).

"The difficulty is that [petitioner] cannot *both* be a member of SNIP who provided no political information *and* a member of SNIP who provided information. The IJ and the BIA were obliged to accept [petitioner]'s testimony as true because there was no explicit adverse credibility finding. *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000). This means that for all purposes in the asylum proceeding, [petitioner] was a member of SNIP but never provided SNIP with political information." (at 1138).

Discretion/Administrative Exercise Of, Not Upheld, Congo (2004). "Although merely being a member of an organization that persecutes others is insufficient to render an alien statutorily ineligible for asylum as a persecutor, ... a factor that falls short of the grounds of mandatory denial is not for that reason alone excluded from consideration as an adverse factor for the discretionary, entitlement prong." (at 1139).

Discretion/Relevant Factors. Relevant factors include separation from spouse, litigating in successive forums, "membership in a terrorist organization," as well as the factors set forth in *Matter of Pula*, 19 I&N Dec. 473-74 (BIA 1987), which include: "whether the alien passed through any other countries or arrived in the United States directly from his country; whether orderly refugee procedures were available to help the alien in any country he passed through; whether he made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country; his living conditions while in the third country; his safety while in the third country; the potential for long-term residency in the third country; whether the alien has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum; the extent of the alien's ties to any other countries where

he does not fear persecution; and general humanitarian considerations, such as his age or health.” (at 1140 n.6).

Discretion/Where Withholding Granted. In *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007), the Board also took a narrow view of the ability to justify a denial of asylum in the exercise of discretion where withholding of removal is granted. In that case, the IJ relied on the alien’s having “provided incomplete or inaccurate information in his asylum application and initial testimony regarding his employment and places of residence in this country, as well as his record of arrest and conviction.” *Id.* at 166. The Board remanded the case for the Immigration Judge to “reconsider the denial of asylum to take into account factors relevant to family unification.” *Id.* at 176.

Cuba

Chronology

- ✖ *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996)

- ✓ *Affirmed*

- ✖ *Not Affirmed*

- ✖ *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996); remanding upon finding petitioner would face severe punishment for illegal departure; REINHARDT; *distinguished by* Kozulin v. INS, 218 F.3d 1112 (9th Cir. 2000); *Al-Harbi v. INS*, 242 F.3d 882 (9th Cir. 2001).

Persecution/Prosecution, Not Affirmed. Punishment for the crime of illegal departure qualifies as persecution for asylum eligibility purposes when the punishment would be severe. “A petitioner may establish persecution within the meaning of the statute if he can show that he left or remained away from his homeland for political reasons and that, if returned, he would be subject to severe punishment, whether as a result of criminal prosecution or otherwise.” (at 429). Three years imprisonment, the sentence for persons convicted of unlawful departure in Cuba identified in the State Department’s report, is undeniably a severe sentence and qualifies as persecution. (at 431).

Dominican Republic

Chronology

- ✓ *Garcia v. Holder*, 749 F.3d 785 (9th Cir. 2014)

✓ *Affirmed*

- ✓ *Garcia v. Holder*, 749 F.3d 785 (9th Cir. 2014) (b) (6); upholding a denial on credibility grounds of an application based on domestic violence by a man with whom she lived. Respondent was apprehended attempting to enter the United States on four occasions. The first time, “[s]he gave the CBP officer a false name, date of birth, and claimed that she was Mexican.” 749 F.3d at 788. There was no issue in terms of the ability to communicate. The next two occasions she was again interviewed and provided the same false information. On the fourth occasion, she was prosecuted in U.S. District Court for illegal entry. She again provided the same false information, including maintaining the lies to the U.S. District Court judge. Upon removal once again to Mexico, she claimed she was Salvadoran and she was taken back to U.S. immigration. After a “reasonable fear” interview, she was found to be eligible for withholding of removal and finally asserted Dominican citizenship. At hearing before an IJ she was found to be incredible. This was so notwithstanding her providing various expert reports about domestic violence in the Dominican Republic, a police report, and an affidavit from her mother. “The IJ based his determination mainly on two factors. The first was Carrion-Garcia’s various lies to U.S. officials and the district court judge, especially about her identity and country of origin. The second was that she equivocated during her interview with the IJ. These factors are generally sufficient to support an adverse credibility determination.” *Id.* at 789 (citing *Don v. Gonzales*, 476 F.3d 738, 741 (9th Cir. 2007)). GOULD

Credibility – Post-REAL ID/Adverse Finding, Upheld, Dominican Republic (2014). The court cites to *Shrestha v. Holder*, 590 F.3d 1034 (9th Cir. 2010), as providing the appropriate standard to be applied in evaluating the “totality of the circumstances.” 749 F.3d at 789. “Carrion-Garcia argues that the nature of her withholding claim—based on physical and sexual abuse—did not sufficiently inform the IJ’s and BIA’s consideration of her falsehoods.” *Id.* at 790. The court noted the IJ’s recognition that her motivation for such was her “fear that she would be returned to the Dominican Republic.” *Id.* The court also found that she had engaged in “equivocations” about what the dialogue she had with the CBP officers during those apprehensions as to being informed by them of the opportunity to assert any fear of return to a country of citizenship and her not then ever having done so. This was based on her claims that “she did not remember” as to the IJ having “pointed out that CBP officers are also required to ask about potential grounds for asylum” and “she should have remembered the statements that pertained so directly to her situation.” *Id.* As to the supportive evidence offered by respondent, while such as “considered” but found to “insufficient” because the witnesses were “not available for cross-examination”

and the expert reports relied on “the authenticity . . . relied on Carrion-Garcia’s discredited testimony” and “do not reveal” any independent knowledge of Carrion-Garcia’s alleged abuse.” *Id.* at 791.

CAT/More Likely Than Not, Not Found, Dominican Republic (2014). In upholding the denial of relief, the court found that the adverse credibility determination was “sufficient” in that all of the supportive materials she offered “were derived from her own assertions” and “[n]one of these sources shows independent first-hand knowledge of Carrion-Garcia’s alleged domestic abuse, and Carrion-Garcia submitted no independent corroborating evidence such as medical records, police investigative reports or witness statements.” *Id.* at 792.

Egypt

Chronology

- ✗ *Rizk v. Holder*, 629 F.3d 1083 (9th Cir. 2011)
- ✗ *Morgan v. Mukasey*, 529 F.3d 1202 (9th Cir. 2008)
- ✓ *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007), *pet for rhr'g en banc denied*, 504 F.3d 973 (9th Cir. 2007)
- ✓ *Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. 2004)
- ✗ *Malty v. Ashcroft*, 381 F.3d 942 (9th Cir. 2004)
- ✗ *Tawadrus v. Ashcroft*, 364 F.3d 1099 (9th Cir. 2004)

✓ *Affirmed*

- ✓ *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007), *pet for rhr'g en banc denied*, 504 F.3d 973 (9th Cir. 2007); upholding the denial of relief to an Egyptian woman. Her view was: “a woman should have her own opinion and should have her own way of living.” (at 649). She also dressed in western attire, such as miniskirts, and did not wear a hijab. Due to her opinions and dress, she encountered problems with the men in her family and also other Islamic men. She testified that her father and brothers would beat her, and that members of a nearby mosque would call her names and talk to her in a vicious way. She also received phone threats from Muslim groups such as Jama Islamia whose members would intercept her while walking home. The police were not able to provide any effective response. After she had been in the U.S. and continued to set forth her opinions, in particular at a meeting in San Francisco, she “received a call...indicating that someone was looking for her and that they would ‘teach her a lesson’ if she returned.” HAWKINS.

Bars to Asylum/One Year Bar, Found, Egypt (2007). In this decision on rehearing, the court held that it has jurisdiction to review denials of asylum on the basis of an untimely filed application. The respondent had entered the U.S. in September 1999, and she did not file her asylum application until June 2001. Her women’s rights activities in the U.S. and further threats received because of those activities were found not to be sufficient to upset the administrative finding regarding a lack of “changed circumstances.”¹³

¹³ See also *Matter of A-M*, 23 I&N Dec. 737 (BIA 2005), involving a respondent who claimed that changed country conditions excused his untimely filing for asylum. The respondent argues that the bombings of nightclubs in Bali is a material change in country conditions that led to the filing of his asylum application after the one-year deadline. The Board rejected respondent’s claim, stating that he “failed to demonstrate how this event materially affected or advanced his asylum claim” as required under 8 C.F.R. § 1208.4(a)(4)(i) (referring to “circumstances materially affecting the applicant’s eligibility for asylum”). The Board explained, “When considered in the context of his asylum claim, the respondent has failed to demonstrate that either the Bali incident or other recent developments have materially affected his eligibility for asylum.”

Withholding of Removal/Denied, Egypt (2007). The court emphasized the much higher showing required for withholding of removal as opposed to asylum. The court did not find past persecution, and it held that the more severe threats made against Ramadan since her entry into the United States “at best support the inference” that she has a well-founded fear of future persecution for purposes of withholding, “they do not compel it.”

- ✓ ***Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. 2004)** (b) (6); rejecting IJ’s implicit adverse credibility determination, but upholding the IJ’s finding of no past persecution and no well-founded fear of future persecution; petition denied and dismissed; BEEZER (PREGERSON, dissenting in part, argues that Coptic Christians are a significantly disfavored group in Egypt and that petitioners suffered past persecution).

Credibility - Pre-REAL ID/Articulable Basis, Affirmed, Egypt (2004). The IJ made an impermissible implicit adverse credibility finding by stating he was *troubled* by certain inconsistencies in the record that made petitioner’s credibility *suspect*.

Religion/Coptic Christian. “[Alien] testified that he feared persecution because as ‘a Coptic Christian I’ve been persecuted everyday [sic], mentally, maybe some physically’ ... he was struck by Arabic teachers ‘[w]ith a whip if he had it, if he doesn’t have a whip with his hands in my face.’ ... Christian children were often struck for no reason. ... [a] brother had to seek medical attention because [assailants] ‘opened his head with a rock.’ ... [A relative allegedly] was killed because he was an outspoken Coptic Christian.” (at 670–71).

Persecution/Discrimination, Affirmed, Egypt (2004). Notwithstanding the court finding the aliens to be credible, they had not established the objective component of the claim because “[d]iscrimination on the basis of race or religion, as morally reprehensible as it may be, does not ordinarily amount to ‘persecution’ within the meaning of the Act.” (at 672–73) (quoting *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (“where private discrimination is neither condoned by the state nor the prevailing social norm, it clearly does not amount to ‘persecution’ within the meaning of the Act.”)). Petitioner’s evidence and testimony established that Coptic Christians are subject to discrimination within Egypt on account of their religion, but such discrimination does not rise to the level of persecution. (at 673).

Well-Founded Fear/Continued Family Presence, Egypt (2004). Continued presence of family members in Egypt, who have been able to obtain university educations and employment after graduation, demonstrates that petitioner does not have an objectively reasonable fear of future persecution. (at 673).

Particular Social Group/Disfavored Group, Affirmed, Egypt (2004). The majority did not accept the dissent’s assertion of disfavored group membership by noting that while there was certainly “discrimination” against Coptic Christians, it did not rise to the required level to establish the existence of a disfavored group.

✗ ***Not Affirmed***

- ✗ ***Rizk v. Holder*, 629 F.3d 1083 (9th Cir. 2011)** (b) (6); This is a pre-REAL ID case. A family applied for asylum under both the husband and the wife’s separate claims. The IJ

denied both of their claims and made an adverse credibility finding as to the husband's claim. The Board affirmed the adverse credibility finding but did not enter a finding as to the wife, or to their children who applied derivatively through both parents. They appealed the adverse credibility finding asserting that the husband was not given opportunity to explain inconsistencies in the record. The circuit found that the adverse credibility determination was supported by substantial evidence and that the petitioner had been provided an opportunity to reconcile the contradictions in his testimony. The circuit granted the wife's petition for review and remanded those claims so that the BIA could make a finding on her and their children's claims. IKUTA.

Credibility - Pre-REAL ID/Inconsistencies, Material, Not Affirmed, Egypt (2011). The IJ had "detailed dozens of inconsistencies, including discrepancies as to times, dates, the sequence of events, and the identity of the individuals who participated in those events." (at 1086). The circuit found that "because Rizk did not offer a reasonable and plausible explanation for the discrepancies, which went to the heart of his claim, either individually or in the aggregate, even though he had ample opportunity to do so, the contradictions on which the IJ relied remain substantial evidence supporting the IJ's adverse credibility determination." (at 1091).

- * *Morgan v. Mukasey*, 529 F.3d 1202 (9th Cir. 2008) ((b) (6)); reversing a denial of relief primarily on credibility grounds. The respondents were Coptic Christians. They reported significant violence and threats made against them and family members by Muslim extremists. The IJ denied relief on the basis of eight material inconsistencies in the testimony. The court found that they were either not in fact inconsistent or were the product of impermissible speculation. NOONAN.

Evidence/Testimony, Exclusion Of, Egypt (2008). The court found error in the IJ's decision to exclude the testimony of the respondents' children because they "were not on the pretrial witness list." (at 1210). This "was not reason for their exclusion once their mother's credibility was put in doubt and they were in a position to corroborate her."¹⁴ *Id.*

- * *Malty v. Ashcroft*, 381 F.3d 942 (9th Cir. 2004) ((b) (6)); reversing BIA's denial of motion to reopen upon finding submitted evidence established changed circumstances in the treatment of Coptic Christians in Egypt and a prima facie basis for relief; remanded; REINHARDT.

¹⁴ In *Casares-Castellon v. Holder*, 603 F.3d 1111 (9th Cir. 2010), the court reversed an order of abandonment for failure of an alien to properly supplement a previously filed application as the IJ had directed.

In *Matter of Interiano-Rosa*, 25 I&N Dec. 264 (BIA 2010), the Board cited with approval *Casares-Castellon v. Holder*, 603 F.3d 1111 (9th Cir. 2010) for the proposition that an IJ does not have the authority to "deem[] a timely filed application abandoned for failure to file supplemental documents within a specified time." The Board cited *Matter of Almanza*, 24 I&N Dec. 771, 774 (BIA 2009) in noting that it is up to the respondent "to meet his burden of establishing that he is eligible for the relief sought." The respondent in the case had a criminal record which cast eligibility into doubt and the IJ had ordered submissions on the issue.

Motion to Reopen/Changed Circumstances, Not Affirmed, Egypt (2004). Evidence regarding changed circumstances will almost always relate to the initial claim, and the critical question is whether the new evidence is qualitatively different from the evidence presented at the hearing and that circumstances have changed sufficiently that a petitioner who previously did not have a legitimate claim for asylum now has a well-founded fear of future persecution. (at 945).

Motion to Reopen/Corroborative Evidence. The court required nothing more than alien's affidavit and a supportive report from a private human rights organization. Reports of events occurring after petitioner's hearing, including mass arrests and torture of approximately 1,000 Egyptian Coptic Christians, murders of numerous Coptic Christians on account of religion, the arrest of the Secretary-General of the Egyptian Organization for Human Rights, and of a growth in the tax that Christians pay to be defended from Muslims, together with a declaration of six separate incidents of violence against petitioner's family members in Egypt—all of which occurred after his asylum hearing—was sufficient to establish changed circumstances warranting the reopening of his case.

Well-Founded Fear/Ten Percent Rule, Not Affirmed, Egypt (2004). "A well-founded fear does *not* require proof that persecution is more likely than not; even a ten percent chance of persecution may establish a well-founded fear. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987); *see also Al Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001)." (at 948).

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- ✱ *Tawadrus v. Ashcroft*, 364 F.3d 1099 (9th Cir. 2004) (b) (6)); remand based on the absence of an effective waiver of counsel; HAWKINS.

El Salvador

Chronology

- ✖ *Reyes v. Lynch*, 842 F.3d 1125, (9th Cir. 2016)
- ✓ *Silva-Pereira v. Lynch*, 827 F.3d 1176, (9th Cir. 2016)
- ✓ *Del Cid Marroquin v. Lynch*, 823 F.3d 933 (9th Cir. 2016) (per curiam)
- ✖ *Quijada-Aguilar v. Lynch*, 799 F.3d 1303 (9th Cir. 2015)
- ✓ *Andrade v. Lynch*, 798 F.3d 1242 (9th Cir. 2015) (per curiam)
- ✖ *Regalado-Escobar v. Holder*, 717 F.3d 724 (9th Cir. 2013)
- ✖ *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013)
- ✓ *Lopez-Cardona v. Holder*, 662 F.3d 1110 (9th Cir. 2011)
- ✖ *Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc)
- ✓ *Ayala v. Holder*, 640 F.3d 1095 (9th Cir. 2011)
- ✖ *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011)
- ✓ *Cortez-Pineda v. Holder*, 610 F.3d 1118 (9th Cir. 2010)
- ✓ *Zetino v. Holder*, 622 F.3d 1007 (9th Cir. 2010)
- ✖ *Aguilar-Ramos v. Holder*, 594 F.3d 701 (9th Cir. 2010)
- ✓ *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008)
- ✓ *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007)
- ✖ *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004)
- ✓ *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161 (9th Cir. 2002)
- ✖ *Rodas-Mendoza v. INS*, 246 F.3d 1237 (9th Cir. 2001)
- ✓ *Molina-Morales v. INS*, 237 F.3d 1048 (9th Cir. 2001)
- ✖ *Ernesto Navas v. INS*, 217 F.3d 646 (9th Cir. 2000)
- ✓ *Rivera-Moreno v. INS*, 213 F.3d 481 (9th Cir. 2000)
- ✖ *Leiva-Montalvo v. INS*, 173 F.3d 749 (9th Cir. 1999)
- ✖ *Del Carmen Molina v. INS*, 170 F.3d 1247 (9th Cir. 1999)
- ✓ *Aguilar-Escobar v. INS*, 136 F.3d 1240 (9th Cir. 1998)

✓ Affirmed

- ✓ *Silva-Pereira v. Lynch*, 827 F.3d 1176, (9th Cir. 2016) (b) (6); denying the petition for review. The alien failed to report several key incidents in his asylum application and admitted that his Salvadoran attorneys lied about his alleged illness to excuse his absence from the Salvadoran court, when in fact he was fleeing the country. *Id.* at *3. The IJ found the applicant non-credible after finding discrepancies between the testimony and the application and denied all of his applications. *Id.* The Board reversed. *Id.* The IJ then thought he had to find the alien credible and granted asylum. *Id.* at *4. The Board again remanded the decision. *Id.* Then, the DHS argued that the applicant was statutorily barred from seeking asylum and withholding “because there were serious reasons to believe Silva committed money laundering in El Salvador and conspiracy to commit murder in Guatemala.” *Id.* The IJ agreed and denied the applications for asylum and withholding on

that ground, but sought additional evidence on the CAT claim. *Id.* The IJ retired and the new IJ denied all forms of relief, due to the serious nonpolitical crimes in both El Salvador and Guatemala, Silva's non-credible testimony, and his failure to demonstrate that he would likely be tortured in either El Salvador or Guatemala. *Id.* at *5. The new IJ allowed the alien to designate Nicaragua as his prospective country of removal, and the IJ directed El Salvador in the alternate. *Id.*

The Circuit agreed that he was ineligible for asylum or withholding of removal because there were serious reasons for believing that he had committed a serious nonpolitical crime in Guatemala. *Id.* at *10. The alien did not argue to the BIA or to the Circuit that he would likely suffer torture if removed to Nicaragua, his proposed country of removal. *Id.* at *12. As such, the Circuit did not disturb the removal order to Nicaragua. *Id.* O'SCANNLAIN.

Credibility - Post-REAL ID/Omissions, Affirmed, El Salvador (2016). The Circuit noted "that 'mere omission of details is insufficient to uphold an adverse credibility finding,'" *id.* at *6 (quoting *Lai v. Holder*, 733 F.3d 966, 971 (9th Cir. 2014)), but an adverse credibility may be supported by omissions that create a very different, "'more compelling'" story of persecution compared to the story in the application. *Id.* (quoting *Zamanov v. Holder*, 649 F.3d 969, 974 (9th Cir. 2011)). A failure to initially mention an event that is crucial for establishing past persecution supports an adverse credibility finding. *Id.* at *7 (citing *Kin v. Holder*, 595 F.3d 1050, 1057 (9th Cir. 2010)). In this case, the Circuit found that the omissions were not details, but, rather, "pivotal events that were crucial to establishing that Silva actually suffered persecution as a result of his political opinion." *Id.* (citations and internal quotation marks omitted).

Credibility - Post-REAL ID/Inconsistencies, Material, Affirmed, El Salvador (2016). A discrepancy as to the date an alien left his or her country is generally "insufficient on its own to support an adverse credibility determination," but may support such a determination if "'accompanied by other indications of dishonesty.'" *Id.* at *8 (quoting *Kaur v. Gonzales*, 418 F.3d 1061, 1067 (9th Cir. 2005)). In this case, the exit date "related directly to Silva's efforts to avoid criminal charges" in El Salvador. *Id.* Therefore, an "'admission of prior dishonesty can support an adverse credibility determination.'" *Id.* (quoting *Don v. Gonzales*, 476 F.3d 738, 741 n.5 (9th Cir. 2007)). Because Silva lied to the Salvadoran court that he was too sick to attend when he was actually leaving the country, "[t]he IJ did not err in finding [him] non-credible on [that] basis." *Id.*

- ✓ ***Del Cid Marroquin v. Lynch*, 823 F.3d 933 (9th Cir. 2016) (per curiam) (b) (6);** denying a petition for review for a denial of relief under CAT." *Id.* at 934. Due to his convictions, the alien was "ineligible for all forms of relief except deferral of removal under CAT," which he sought on the basis of his status as a former gang member. *Id.* Before addressing his claim, the Ninth Circuit found that the petition for review was not moot based on his removal. *Id.* at 936. Next, the Ninth Circuit determined that "[s]ubstantial evidence support[ed] the BIA's finding that it is not more likely than not that Del Cid Marroquin will be tortured in El Salvador." *Id.* at 937. PER CURIAM.

CAT/Acquiescence, Affirmed, El Salvador (2016). The Circuit found that despite evidence of gang membership being illegal, there was insufficient evidence "that the [Salvadoran]

government tortures former gang members or those with gang-related tattoos.” *Id.* at 937. The Circuit also found that “there is substantial evidence that the [Salvadoran] government enforces . . . laws [that prohibit extrajudicial killings and violence]—albeit imperfectly—against both gang members and rogue police officers.” *Id.* Finally, the Circuit found the BIA’s conclusion as to government acquiescence—“a government does not ‘acquiesce’ to torture where the government actively, albeit not entirely successfully, combats the illegal activities”—to be consistent with its similar holding in *Garcia-Milian v. Holder*, 755 F.3d 1026, 1034 (9th Cir. 2014). *Id.*

- ✓ ***Andrade v. Lynch*, 798 F.3d 1242 (9th Cir. 2015) (per curiam) (b) (6)**; denying a petition for review for a denial of relief under CAT. The Circuit found that the BIA had given “extensive and careful consideration” to the country conditions evidence of the harms deportees and suspected gang members could face upon return to El Salvador. *Id.* at 1244-45. Accordingly, “[s]ubstantial evidence . . . supported the BIA’s conclusion that [the alien] had not proved that deportees (with or without tattoos) are likely to experience mistreatment rising to the level of torture.” *Id.* at 1245 (internal quotation marks and emphasis omitted). In addition, the alien argued that the fact that he had two tattoos—one of his initials and one of his girlfriend’s initials—that he could not afford to remove was “individualized evidence of a likelihood of torture.” *Id.* The Circuit disagreed and held that “the evidence in the record did not compel a contrary conclusion in [h]is case.” *Id.* PER CURIAM.

CAT/Tattoos, El Salvador (2015). The Circuit noted that *Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011) “establishes that the BIA must consider the risk of torture [in a country where gang members are routinely tortured] posed by conspicuous tattoos that display affiliation with a gang.” *Id.* at 1245. The mere fact that a person has tattoos that are unrelated to gangs, however, is insufficient to warrant CAT relief. *Id.*

- ✓ ***Lopez-Cardona v. Holder*, 662 F.3d 1110 (9th Cir. 2011) (b) (6)**; affirming a denial of relief. Respondent had been convicted of first degree burglary and sentenced to four years of imprisonment. He was found to have been convicted of an aggravated felony crime of violence, and a particularly serious crime (PSC). As such, he was ineligible for both asylum and withholding of removal. The CAT claim was denied on the merits. The circuit appears to equate a crime of violence with a PSC for withholding, without any discussion or citation to case authority, even though the respondent was only sentenced to four years of imprisonment.

Bars to Asylum/Particularly Serious Crime, Found, El Salvador (2011). The circuit distinguishes *United States v. Aguila-Montes*, 655 F.3d 915 (9th Cir. 2011) (en banc). In that case, the district court had been reversed when it held that such a conviction would be a “generic burglary” and thus not a crime of violence. Here, the conviction was so held, as evaluated under 18 U.S.C. 16(b), “which looks to whether the crime is a felony ‘that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.’” (at 1113).

CAT/More Likely Than Not, Not Found, El Salvador (2011). The denial was upheld notwithstanding the respondent having been beaten by gang members but who stopped “after they saw police in the area. That the police were willing and able to protect people from this gang is evidence Lopez would not be tortured upon his return. . . . It could be that Lopez and his cousin were just unfortunate bystanders who were in the wrong place at the wrong time.” (at 1114).

- ✓ *Ayala v. Holder*, 640 F.3d 1095 (9th Cir. 2011) ((b) (6)); denying a claim where a former soldier had been “attacked and threatened by drug dealers he had personally arrested.” (at 1096). Credibility was not an issue. PER CURIAM.

Particular Social Group/Found, El Salvador (2011). The circuit was willing to accept the PSG. However, the claim did not succeed on the merits because the respondent had not demonstrated that “any persecution was or will be on account of his membership in such group.” See, *Santos-Lemus v. Mukasey*, 542 F.3d 738, 743–44 (9th Cir. 2008). “The evidence demonstrates that Ayala was only shot at and threatened because, while an officer, he had arrested a particular drug dealer. Though disturbing, this type of persecution is not cognizable under the INA.” See, *Matter of C-A-*, 23 I&N Dec. 951, 958–59 (BIA 2006). (“[I]f a former police officer [is] singled out for reprisal, not because of his status as a former police officer, but because of his role in disrupting particular criminal activity, he [is] not ... considered, without more, to have been targeted as a member of a particular social group.”); see also *Cruz-Navarro v. INS*, 232 F.3d 1024, 1030 (9th Cir. 2000).

- ✓ *Cortez-Pineda v. Holder*, 610 F.3d 1118 (9th Cir. 2010) ((b) (6)); upholding a denial of relief. Respondent had primarily sought relief under NACARA. He alternatively sought asylum-related relief. The key issue relates to Respondent’s date of arrival. The NTA alleged the date that respondent had set forth in his initial application filed on June 1, 1990. Respondent conceded this date. A fraud investigation subsequently revealed that respondent had made inconsistent statements regarding his entry date as occurring in 1991. At the evidentiary hearing, the IJ credited the testimony of the then-INS agents, who were fully subjected to cross-examination, over the respondent’s testimony. The IJ denied the asylum application on adverse credibility grounds. GOULD.

Bars to Asylum/Hakopian Limited; One Year Bar, Judicially Found Fact (2010). The circuit limited *Hakopian v. Mukasey*, 551 F.3d 843 (9th Cir. 2008) as not “establish[ing] a blanket rule that facts alleged in the NTA, if admitted before the IJ, bind the court and the parties.” The court found that since the “government vigorously disputed the entry date . . . after notice was given . . .” there was no “binding judicial admission” that would preclude the government from contesting this issue at a subsequent hearing. The government had not lodged an additional allegation with respect to the date of entry.

Due Process/Time for Preparation. Notwithstanding Respondent’s claim, the period of four months of preparation for the contested hearing, which had been set by agreement, was found to be entirely adequate.

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, El Salvador (2010). The adverse credibility determination was upheld under pre-REAL ID Act case law. The circuit found that the incredibility relating to the date of entry was “material and call[ed] into question whether Cortez-Pineda actually experienced the problems that he said precipitated his decision to depart El Salvador.” Respondent had maintained that certain problems occurred at a time that he claimed to have been in a different country.

CAT/Credibility. “Where, as here, the petitioner’s CAT claims are based on the same statements . . . that the IJ determined to be not credible” and the petitioner “points to no other evidence that he could claim the IJ should have considered, the CAT claim must be rejected,” citing *Farah v. Ashcroft*, 348 F.3d 1153, 1157 (9th Cir. 2003).

- ✓ ***Zetino v. Holder*, 622 F.3d 1007 (9th Cir. 2010)** (b) (6); in a decision published after the petition for rehearing, the Ninth Circuit affirmed the denial of relief. The decision primarily discusses the discretionary basis of the BIA to refuse to consider an untimely brief. The claim was nonetheless considered on the merits. The basis of the claim was that “in 1993 six members of his family had been killed by gunfighters attempting to steal his grandfather’s land.” Some farmers who were supposedly his grandfather’s friends; they wanted more land so they could cultivate. Respondent also testified that he feared gang members would attempt to recruit or harm him and that he would face potential “revenge” if he were to return. He further expressed concern that he had “tattoos . . . and they would mistake him for being a rival gang member.” Credibility was not at issue. The case was decided under the REAL ID Act standards, but this was not significant in terms of the holding. TALLMAN.

Nexus/Motive Not Found, Post REAL ID (2010); Persecution/Criminal Motivation. The court concurred that, with respect to the killing of his relatives, the incidents were “clearly a personal dispute.” The court affirmed that neither the killing of his relatives nor his fear of the gangs bears a nexus to a protected ground. The respondent implied that the only motivation for the murders was the land itself. “An alien’s desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground.”

Due Process/Untimely Filing. The respondent “cannot point to anyone but himself to explain the untimeliness. . . . We cannot conclude that by missing the deadline he had successfully extended he somehow deprived himself of due process. The court found that *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002) was no longer “good law,” where no jurisdiction permitted the review of a denial by the Board to sua sponte review an untimely motion to reopen.

- ✓ ***Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008)** (b) (6);¹⁵ affirming a denial of asylum and related relief to an individual who, along with his family, had been

¹⁵ In *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011), the Board was reversed when it had denied relief to a Salvadoran who reported considerable violence and threats directed at he and his family by a criminal gang. There it was held that “family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses” could be a PSG. The IJ whose decision to grant

mistreated and threatened by a criminal gang. Respondent's brother had been robbed and beaten. The gang continued to pursue him for "revenge" even though there had been no contact with law enforcement authorities. An older brother was shot and killed and the "gang had sent many anonymous notes threatening the family." A younger brother was robbed and harassed. The respondent himself was beaten, threatened, and robbed. WALLACE.¹⁶

Particular Social Group/Family, Affirmed, El Salvador (2008). The court upheld the denial of relief on the basis of the "mother's continued safety in his hometown." This was so even with the recognition "she is a female and the Maras gang targeted young males in El Salvador and not older females" in that the testimony had been that the "entire family was targeted by the Maras."

relief was reversed by the Board, was found to have been reviewed under a de novo, as opposed to the clear error standard, which should have been used.

¹⁶ A long unpublished decision, *Sarkisian v. AG*, 322 F. App'x 136 (3d Cir. 2009), denies relief to a woman who claimed PSG status as one who sought to be trafficked as a prostitute and had been significantly assaulted in the process thereof without being able to get any assistance from the local (Armenian) police. The court noted the principle: "the experience of past persecution cannot define a particular social group motivating the past persecution. . . . a particular social group must exist independent of the persecution suffered by the applicant," citing *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003). The respondent's argument was that her youth and gender put her at risk for future abduction. The court noted that "possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group." *Id.* (citing *Gomez v. INS*, 947 F.2d 660, 664 (9th Cir. 1991); *Escobar v. Gonzales*, 417 F.3d 363, 367-68 (3d Cir. 2005) (concluding that poverty, homelessness, and youth, though "appealing to sympathy and compassion" are "far too vague and all-encompassing to be characteristics that set the perimeters for a protected group").

The Third Circuit's effort at dealing with PSG issues growing out of gang harassment cases is illustrated by *Valdiviezo-Goldamez v. AG*, 502 F.3d 285 (3d Cir. 2007) and the subsequent decision at 663 F.3d 582 (3d Cir. 2011) which also resulted in a remand. The first remand was primarily directed at "whether 'young men who have been actively recruited by gangs and who have refused to join the gangs' is a recognized PSG. In again denying relief, the Board held, "it had decided the closely analogous case of *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) and relied on its analysis of "particularity" and "visibility" to again justify the denial. In a very long decision, the court did not agree. The court did accept the denial of the CAT claim upon its finding that the Honduran "government seeks to control the gang problem and protect its citizens". It also rejected a political opinion claim by stating: "There must be evidence that the gang knew of his political opinion and targeted him because of it. However, there is such evidence here."

On Jan. 31, 2012, the Ninth Circuit entered an order granting a rehearing en banc in the unpublished decision of *Henriquez-Rivas v. Holder*, 670 F.3d 1033 (9th Cir. 2012). The issue presented is whether individuals who testify against gang members in open court have the requisite degree of "social visibility" so as to justify PSG status. Relief had been denied on the basis of such cases as *Velasco v. Holder*, 593 F.3d 975 (9th Cir. 2010) and *Soriano v. Holder*, 569 F.3d 1162 (9th Cir. 2009) which found that government material witnesses or informants do not qualify as a PSG. There was a concurrence in the panel decision which called for en banc review. This notes other holdings in addition to *Crespin* which found that shared past experiences can be seen as a sufficient immutable characteristic, regardless of divergent opinions, lifestyles, interests, cultural backgrounds, or political leanings. *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010); *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

Particular Social Group/Gangs, Not Found, El Salvador (2008). The court found that the proposed PSG of “young men in El Salvador resisting gang violence” did not have the requisite degree of “social visibility” nor “well defined boundaries,” nor could the “group be defined with sufficient particularity to delimit its membership.” The court cited with approval *Matter of A-M-E*, 24 I&N Dec. 69 (BIA 2007) and *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).¹⁷

Political Opinion/Not Found, El Salvador (2008). Notwithstanding the assertion that respondent was “anti-gang and that he manifested this opinion in expressing resistance against the Mara,” this argument was not accepted. “Resistance to a gang’s recruitment efforts alone [does not] constitute political opinion.” Rather, respondent “was victimized for economic and personal reasons.” The court cited with approval from *Ochave v. INS*, 254 F.3d 859, 864 (9th Cir. 2001): “asylum generally is not available to victims of civil strife, unless they are singled out on accord of a protected ground. . . persecution on account of political opinion. . . cannot be inferred from acts of random violence by [people] who may have divergent political views.” “Without evidence of an actual political opinion or motive in Santos-Lemus’s or the gang’s actions, his claim fails.”

CAT/More Likely Than Not, Not Found, El Salvador (2008); Public Official. Again in denying this claim, the court emphasized that “his mother had remained unharmed.” The respondent’s “fears would be committed by private individuals, not the government, and the Salvadoran government was not even aware that [respondent and his brothers] had been targeted by the gang because the incidents were never reported. . . .”

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- ✓ *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (b) (6); affirming a denial of relief based on a claim of membership in a particular social group (PSG). The respondent came to the U.S. at age four as an LPR. He joined a gang at age fourteen. The gang engaged in violence. “Arteaga testified that while some members of his gang committed crimes, such as trading in drugs and stealing, he did not.” (at 943). Still, he was convicted of theft and possession of drugs. “Boiled down, his argument rests ultimately on his claim that his tattoos mark him for potential persecution.” (at 945). Credibility was not an issue. TROTT.

Particular Social Group/Gangs, Not Found, El Salvador (2007). Even assuming the tattoos to be “indelible,” the court agreed with *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003), that “tattooed gang member” would be “overbroad” notwithstanding the social group being defined under different formulations. (at 945). This would be so even assuming he had left the gang by the time of his asylum application. “One who disassociates himself from a group may fall analytically into a definable category, but the category of non-associated or disaffiliated persons in this context is far too unspecific and amorphous to be called a social group, whether the person is tattooed or not.” *Matter of A-M-E*, 24 I&N Dec. 69 (BIA 2007) (at 946). With regard to the alternative argument of “his unique and shared experience as a gang member,” this would not be considered an “innate” characteristic. (at 945). The court distinguished other case law where such was held to constitute a PSC. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000)(finding gay men with female sexual identities as a social group) or *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (identifying members of a family as a social group).

¹⁷ In *Matter of N-C-M-*, 25 I&N Dec. 535, 536 (BIA 2011) the Board held “victims of gang violence and unwilling gang recruits do not describe a PSG.”

Particular Social Group/Family, Affirmed, El Salvador (2004). Citing to *Sanchez-Trujillo v. INS*, 801 F.2d 1572, 1576 (9th Cir. 1986), the court stated that membership in a family is deemed as an “innate characteristic which is so fundamental to the identities or consciences of its members they cannot or should not be required to change it.” (at 944).

Refugee Law/Purpose Of. “To do as Arteaga requests would be to pervert the manifest humanitarian purpose of the statute in question and to create a sanctuary for universal outlaws.” (at 946).

Aggravated Felony/Theft. The court rejected the argument that in order for the theft conviction to be deemed an aggravated felony, “the intent to permanently deprive another of property” must be demonstrated. The court relied on *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 820 (2007), which holds that a theft conviction can be an aggravated felony, “even if such deprivation is less than total or permanent.” (at 947) (internal quotation marks omitted). The court distinguished *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007), which held that such conviction under the California theft statute would not be an aggravated felony because one could have been convicted as an accomplice after the fact because the record of conviction established that the conviction was for “taking a vehicle with the intent to either permanently or temporarily deprive the owner of possession—a theft offense.” (at 947).

CAT/More Likely Than Not, Not Found, El Salvador (2007). The circuit’s recognition of information in the record such as a statement from a “[m]agistrate” that “if [Arteaga were] deported, he will suffer indefinite detention and likely death or physical abuses at the hands of rival gangs and detention authorities will not provide him with adequate protection,” (at 940, 949), was not found to meet the requisite burden of proof that the risk of torture was more likely than not.

✓ *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161 (9th Cir. 2002) (b) (6); upholding IJ’s denial of special rule cancellation under NACARA based on alien’s failure to file an asylum application; decided on equal protection and due process grounds without addressing merits of asylum claim; petition denied; W.FLETCHER.

✓ *Molina-Morales v. INS*, 237 F.3d 1048 (9th Cir. 2001) (b) (6); denying petition based on finding that persecution was not related to alien’s affirmative political beliefs; TASHIMA; (B.FLETCHER, dissenting, argued that the political component outweighed the personal in finding persecution on account of imputed political opinion, in that politician’s political status during his race for mayor would have been greatly affected by news of his commission of rape and that he was able to enlist the assistance of the local police to suppress the report.); *distinguished by Ventura v. INS*, 264 F.3d 1150 (9th Cir. 2001).

Political Opinion/Imputed, Not Found, El Salvador (2001). Violence and threats against alien, for reporting to police that a local ARENA party leader had raped his aunt, were on account of a personal matter and not on account of any imputed political opinion. (at 1051).

Nexus/Motive Not Found, Pre REAL ID, El Salvador (2001). Molina argues that his reporting of the rape of his daughter was construed “as an act against the ARENA party” and that the significant physical mistreatment he suffered “was on account of an imputed political opinion.” (at 1051). “Molina does not assert that he ever expressed views that may have been construed as

political opposition ... Nor is Molina a member of a large, politically active family, many of whom may have already been persecuted for their political beliefs.” (at 1051–52).

Nexus/Retribution, Not On Account of Protected Ground, El Salvador (2001). Disappearance of alien’s aunt was due solely to her reporting of the rape, and there was no evidence that ARENA leader’s supporters presumed sympathy on her part or alien’s part for an opposing political view. “The mere fact that Salazar was a politician does not compel a conclusion that Molina was persecuted on account of any political opinion his persecutors imputed to him. Salazar’s part-time profession as a politician is merely incidental.” (at 1052).

- ✓ *Rivera-Moreno v. INS*, 213 F.3d 481 (9th Cir. 2000); upholding IJ’s ruling that alien’s expression of political neutrality to guerrillas was not causally connected to bombing of her house, and she thus was not persecuted because of her neutrality; petition denied; ALDISERT.

Political Opinion/Neutrality. Asylum applicant’s expression of political neutrality to guerrillas in Perquin, El Salvador in 1980, when they forced her to provide nursing services to wounded, was not causally connected to bombing of her house by guerrillas in San Miguel, El Salvador in 1989, which followed guerillas’ discovery that she was nurse and her refusal to join them, and she thus was not persecuted because of her neutrality; record contained no evidence that applicant expressed political neutrality in the eight years between the two incidents, and she expressed no political views to guerrillas in 1989.

- ✓ *Aguilar-Escobar v. INS*, 136 F.3d 1240 (9th Cir. 1998) ((b) (6)); holding that any persecution suffered by alien because of her government job was not on account of race, religion, nationality, membership in particular social group, or political opinion; mandate stayed to allow application for NACARA relief; GOODWIN.

Nexus/Motive Not Found, Pre REAL ID, El Salvador (1998). Any persecution suffered by alien in El Salvador because of her government job of bus dispatcher, her husband’s position as police officer, and another relative’s position as mayor of town, and because of armed conflict between police and government forces on the one hand and anti-government guerillas on the other, was not on account of a protected criteria that government could not control.

✗ *Not Affirmed*

- ✗ *Reyes v. Lynch*, 842 F.3d 1125, (9th Cir. 2016) ((b) (6)); affirming the BIA’s interpretation of particularity and social distinction, and is entitled to *Chevron* deference, thus, denying petition for review on asylum and withholding; affirmed the Board’s holding alien’s proposed social groups were not particular or socially distinct. The panel vacated the denial of protection under CAT and remanded the case for additional consideration of the application for CAT relief.

Particular Social Group; Particularity; Social Distinction; Immigration Judges may cite *Matter of W-G-R-* and *Matter of M-E-V-G-*, which remain authoritative statements of the “particularity” and “social distinction” requirements for a particular social group. *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). Together, these decisions clarified that in order to be cognizable, a proposed particular social group must be: (1) composed of members who share a common, immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. In a unanimous opinion, the Ninth Circuit panel held that the BIA’s requirements of particularity and social distinction were reasonable interpretations of the undefined term “particular social group,” warranting deference under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). The panel held that the particularity requirement is reasonable because it ensures that proposed groups are “discrete” and not “amorphous,” and that the social distinction requirement is also reasonable. The panel rejected petitioner’s arguments that the social distinction requirement is a new requirement rather than a renaming of the social visibility requirement and that social distinction is redundant in light of the nexus requirement. The panel rejected the argument that any imposition of a new evidentiary standard by the Board resulted in prejudice to the petitioner, and declined to reach arguments based on the nexus requirement and the Board’s reliance on *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007).

Convention Against Torture; The BIA impermissibly conducted additional fact-finding in analyzing evidence of government acquiescence to torture and granted the petition for review as it related to the denial of CAT. The panel held that the BIA’s approval of the IJ’s “predictive findings” could not support the denial of CAT relief. Also, citing *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008), the panel stated that killing can constitute torture, rejected the Immigration Judge’s “inference” to the contrary, and instructed that the Board should have “acknowledged and corrected” the error and remanded for additional fact-finding. The panel also held that the BIA impermissibly conducted its own fact-finding to find a lack of evidence of government acquiescence to torture—a ground not relied upon by the IJ.

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- * *Quijada-Aguilar v. Lynch*, 799 F.3d 1303 (9th Cir. 2015) ((b) (6)); granting a petition for review and remanding a denial of withholding under the INA and the CAT, as well as deferral of removal under the CAT. *Id.* at 1304. The Circuit found that the alien’s conviction was not categorically an aggravated felony crime of violence and thus did not bar him from withholding of removal as a particularly serious crime. *Id.* at 1307. The Circuit also remanded so that the BIA could consider the likelihood of torture given his family’s experiences in light of the requirement “to consider ‘all evidence relevant to the possibility of future torture.’” *Id.* at 1308 (quoting 8 C.F.R. § 1208.16(c)(3)). NGUYEN.

CAT/Evidence Considered, El Salvador (2015). The Circuit held that “CAT’s implementing regulations require the agency to consider ‘all evidence relevant to the possibility of future torture.’” *Id.* at 1308 (quoting 8 C.F.R. § 1208.16(c)(3)). In other words, “CAT claims must be considered in terms of the aggregate risk of torture from all sources, and not as separate, divisible CAT claims.” *Id.* (citing *Cole v. Holder*, 659 F.3d 762, 775 (9th Cir. 2011)).

- * *Regalado-Escobar v. Holder*, 717 F.3d 724 (9th Cir. 2013) ((b) (6)). Remanding a denial of relief. Respondent had been asked to participate in activities on behalf of a

political organization, the FMLN, “that has significant representation in both national and local governments.” At 727. “He refused to join because he had “always been a neutral person [and does not] agree with parties that use violence to resolve their political problems.” Id. He was thereafter physically assaulted and threatened. This is a REAL ID Act case. Relief had been denied because Respondent had not shown a nexus between his asserted political opinion and the harm he experienced: “Regalado merely showed that he was opposed to the FMLN's violent activities for which he was being recruited . . . [or to] assist them in their violent activities.” At 728. Credibility was not at issue. SMITH. There was a dissent by KLEINFELD.

Political Opinion/Whistleblowing, Not Affirmed, El Salvador. “The BIA erred as a matter of law in holding that opposition to the FMLN's violence could not be a political opinion.” At 729. The case was remanded to ascertain “whether Regalado had a protected political opinion.” At 730. There was a need to ascertain whether “those violent activities were in furtherance of the FMLN's politics or merely apolitical acts of violence.” Id. The dissent argues that the order to remand “makes no sense,” because there was no evidence that anyone knew of Regalado-Escobar’s “opposition to violence” and presumably that such evidence would be required to make out a successful claim. At 731. However, the Circuit drew an analogy to its whistleblower cases, such as *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000): “opposition to a political party's violent activities may amount to opposition to the political party itself, if the violence is integral to the party and inextricably linked to its political activities, rather than constituting mere unrelated acts of violence perpetrated by individuals who happen to be part of a political group.”

Nexus/Motive Not Found, Post REAL ID, El Salvador (2013). The Circuit upheld the BIA’s finding that Regalado-Escobar had not experienced past persecution. “Even if the BIA had correctly held that opposition to a political organization's violent activities can constitute a political opinion . . . Regalado presented little evidence that his attackers were motivated by anything other than his refusal to join them, increase their ranks, and participate in their violent activities. To have successfully demonstrated past persecution on the basis of a political opinion, Regalado must have shown that he was attacked because of his opposition to the FMLN's ideology or their violent methods of promoting that ideology. Regalado offered no evidence to show that his attackers were even aware of his political beliefs.” At 730 (citing *Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir.1997) (“[T]he applicant must ... show that this opinion was articulated sufficiently for it to be the basis of his past or anticipated persecution.”).

CAT/Acquiescence, Affirmed, El Salvador (2013). The BIA’s denial of Respondent’s CAT claim was upheld. Notwithstanding the Circuit’s recognition of the significant level of violence in Salvadoran politics, “Regalado has not shown that public officials were aware of the attacks by the FMLN or that public officials would cause or acquiesce in FMLN attacks on Regalado in the future.” At 731.

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- * *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc) (b) (6); reversing and remanding a denial of asylum with respect to the administrative requirements of “social visibility” and “particularity” of a particular social group (PSG). The respondent has publically testified in a criminal trial against gang members who had killed her father and suffered adverse consequences. The Court overruled the holdings of

Soriano v. Holder, 593 F.3d 1162, 1169 (9th Cir. 2009) (“government informants” are not a PSG because they do not have the requisite degree of “social visibility”) and *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 (9th Cir. 2010) (“material witness on behalf of the United States [who was forced to testify] against illegal smugglers” did not have the requisite “particularity” to be a PSG). BEA. There was a strong dissent by KOZINSKI.¹⁸

¹⁸ In an administrative response to the diverse appellate decisions which discuss PSG analysis, the Board entered on Feb. 7 two complimentary decisions in *Matter of W-G-R-*, 26 I&N Dec. 208 and *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014). *Matter of W-G-R-* arose in the Ninth Circuit and in particular represents the administrative response to questions raised in *Henriquez*. The Board notes its concern: “The social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that needed to be shown” in order to attain relief. 26 I&N Dec. at 231.

The Board has stood by its former case law but has now relabeled its “social visibility” test to be “social distinction.” It emphasized that this does not mean “[literal or] ocular visibility.” Instead, “a group need not be seen by society; rather, it must be perceived as a group by society.” *Matter of W-G-R-*, 26 I&N Dec. at 216; *Matter of M-E-V-G-*, 26 I&N Dec. at 240. The Board emphasizes that the “perception” need be from society as a whole as opposed to the “persecutor.” 26 I&N Dec. at 242. The Board found that:

A successful case will require evidence that members of the proposed particular social group share a common immutable characteristic, that the group is sufficiently particular, and that it is set apart within the society in some significant way. Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as “distinct” or “other” in a particular society.

Id. at 244. Or, as set forth in *Matter of W-G-R-*: “Social distinction exists where the relevant society perceives, considers, or recognizes the group as a distinct social group.” 26 I&N Dec. at 217 (citations omitted).

In applying these standards to factual case presented:

[T]he putative group of “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” does not constitute a PSG. . . . The group lacks particularity because it is too diffuse, as well as being too broad and subjective. . . . [T]he group could include persons of any age, sex, or background. It is not limited to those who have had a meaningful involvement with the gang and would thus consider themselves—and be considered by others—as “former gang members.” . . . The respondent also has not shown that his proposed social group meets the requirement of social distinction. The record contains scant evidence that Salvadoran society considers former gang members who have renounced their gang membership as a distinct social group [as opposed to documentation] describing gangs, gang violence, and the treatment of gang members.

Id. at 221-23. Accordingly, notwithstanding the respondent having been shot in the leg “during one of the two attacks he suffered,” because he “has not shown membership in a cognizable social group, neither the harm he suffered, nor the future harm he fears from gang members or the police” provides a basis for relief. *Id.* at 209, 223.

Even assuming that the respondent had shown membership in a cognizable social group, the Board would deny relief for failure to have demonstrated the requisite “nexus between the harm he fears and his status as a former gang member.” *Id.* at 223. “The respondent has not shown that any acts of retribution or punishment by gang members would be motivated by his status as a former gang member, rather than by the gang members’ desire to enforce their code of conduct and punish infidelity to the

Particular Social Group/Social Visibility. “Social visibility refers to ‘perception’ rather than ‘on-sight’ visibility and “the perception of the persecutors may matter the most,” as opposed to the respondent’s subjective perception of the group. 707 F.3d at 1089. The Circuit cited *Sanchez-Trujillo v. INS*, 801 F.2d 1572 (9th Cir. 1986) with approval. In *Sanchez-Trujillo*, relief was denied to “young, urban, working class males of military age who had never served in the military,” despite the great danger he faced of violence and death at the peak of the Salvadoran civil war, because the group was not socially visible. Similarly, in the “gang recruitment” cases of *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008), the respondents had not shown that, objectively, the group would be perceived as defined. On the other hand, *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), defined a social group (“[M]ale homosexuals with female sexual identities”) that has a “particular characteristic . . . that defines a finite collection of individuals as a group.”

Particular Social Group/Particularity. “Both BIA and our own precedent have blended the ‘social visibility’ and ‘particularity’ analysis: ‘social visibility’ has been determined based on perception, as discussed above, and ‘particularity’ too has been based on society’s perception whether a group has delimitable boundaries.” 707 F.3d at 1090 (citing *Ramos-Lopez v. Holder*, 563 F.3d 855, 861 (9th Cir. 2009) (finding that a proposed social group of “Honduran males who

gang.” *Id.* at 224 (citation omitted). In other words, there is a critical difference between the fear expressed by the respondent in terms of “his status as a former gang member, as opposed to his acts in leaving the gang.” *Id.* An alternate PSG of “deportee from the US” was also rejected as “too broad.” *Id.* at 223.

The expansive judicial interpretation of particular social groups are underscored by *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc). There, an Albanian woman who made no claim of past persecution was found to have entitlement to PSG status as one who faced the risk of being trafficked as a prostitute by a criminal organization. There was a dissent by Chief Judge Easterbrook who wrote “What the Seventh Circuit has done in this and other recent cases is read ‘because of . . . membership in a particular social group’ in a way that includes everyone threatened by criminals, rebels, or anyone else a nation’s government does not control. This makes eligible for asylum everyone who faces a substantial risk of harm in his native land, no matter the reason.” *Id.* at 680. In apparent response, the majority (the decision was decided 9-2) cites to *Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005): “The number of followers of Falun Gong in China is estimated to be in the tens of millions, all of them subject to persecution.... [Because] [a]nyone, we suppose, can get hold of a book of [Falun Gong] teachings, start doing the exercises, and truthfully declare himself or herself a bona fide adherent to Falun Gong [,][t]he implications for potential Chinese immigration to the United States may be significant.... But Congress has not authorized the immigration services to [control Chinese immigration] by denying asylum applications in unreasoned decisions.” 733 F.3d at 674. In *Gathugu v. Holder*, 725 F.3d 900 (8th Cir. 2013), the Eighth Circuit reversed a denial of relief in a typical Kenyan case involving an individual who feared violence from the Mungiki and expressed its agreement with the similar holding in *Wanjiru v. Holder*, 705 F.3d 258, 260 (7th Cir. 2013). “We hold that Mungiki defectors are socially visible, . . . constitute a PSG, and . . . the Kenyan government is unable or unwilling to control” them. 725 F.3d at 907.

The Seventh Circuit also cites to *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010), where the Ninth Circuit held that Guatemalan women who fear being at risk from general criminal violence may be seen as members of a PSG. *Id.* at 669. In light of *Perdomo*, *Henriquez-Rivas*, and *Cordoba v. Holder*, 726 F.3d 1106 (9th Cir. 2013) (holding that landowners may be entitled to recognition as a particular social group), it seems likely that the Ninth Circuit may agree with the Seventh Circuit.

resisted MS-13 recruitments efforts failed the particularity requirement because there was no indication that there was any “perception that the males in question were members of a class”). **Particular Social Group/Gangs, Found, El Salvador (2013).** In reversing, the Circuit noted the failure of the Board to “consider significant evidence that Salvadoran society recognizes the unique vulnerability of people who testify against gang members in criminal proceedings, because gang members are likely to target these individuals as a group.” *Id.* at 1092. The decision does not overrule the prior case law pertaining to denials of relief as to “gang recruitment” or to those “generally opposed to gangs.” “The ‘opposition to gangs’ group might not be ‘socially visible’ if the society in question does not perceive those with such views as constituting a distinct group of persons.” *Id.* at 1093.

Particular Social Group/Entitlement to Relief, El Salvador. Even if an individual is found to be a member of a recognized group, it must still be shown that the basis of the risk is “on account of” a protected ground as opposed to membership in and of itself. For example, in *Perlera-Sola v. Holder*, 699 F.3d 572 (9th Cir. 2012), the Circuit was willing to accept that the alien was a member of a recognized group, his family, that had been targeted for violence by a criminal gang. The Circuit stressed that the “kinship” criterion applies only where the motivation for persecution is indeed kinship, as opposed to violence for a common reason that was not “kinship.” In other words, “Mr. Perlera did not provide evidence of the motivation for the alleged attacks” as being based on protected criteria. 699 F.3d at 577. This expectation would appear to be also required under the REAL ID Act’s directive that the protected criteria be “at least one central reason” for the persecution. *Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009).

- ✱ ***Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc) (superseding the last panel decision of 563 F.3d 863 (9th Cir. 2009));** Remanding a denial of relief. He sought asylum related relief. Respondent had been convicted three times of drunk driving. He was not charged as an aggravated felon. Because of aggravating circumstances, he had been sentenced to terms of imprisonment of one year, 16 months, and then two years. He had been found to have been convicted of a particularly serious crime and hence, was found ineligible for asylum and withholding as a matter of law. “The IJ accepted that Delgado’s parents were killed in 1980 on account of their political activities, but found that, as a result of improved country conditions, Delgado did not show that it was more likely than not that he would be tortured were he returned to El Salvador.” (at 1099). FISHER. There was a partial dissent by REINHARDT.

Bars to Asylum/Particularly Serious Crime, Not Found, El Salvador (2011). The circuit accepted *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007), that it is not necessary for a PSC to be an aggravated felony. The circuit remanded because it is not clear on what basis the respondent was found to have been convicted of a PSC. That is to say, that whether the administrative finding was based on the fact that one of the convictions would be deemed a PSC, the convictions cumulatively, or whether the third would be so, in light of the earlier convictions. The circuit did not opine on the permissibility of such bases. Judge Reinhardt makes clear that he would not accept reliance on any factor beyond one specific conviction.

CAT/Acquiescence, Not Affirmed, El Salvador (2011). “The record reflects that conditions in El Salvador have improved, and the political violence that led to the murder of Delgado’s parents

has ended. Although we believe Delgado when he says that it will be like torture for him to return to the country where his parents were murdered, that is not a harm inflicted ‘at the instigation of or with the consent or acquiescence of’ the current Salvadoran government.” (at 1108).

- ✱ *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011) (b) (6); granting a stay of removal but noting the strong likelihood of success. The alien’s claim is based on the REAL ID Act. The administrative decision denied relief to a respondent who was deemed credible and that he was “personally targeted for extortion and savage beatings by a particular group of individuals affiliated with the Farabundo Martí National Liberation Front (“FMLN”), a political party.” (at 970). The case was denied because he had “failed to establish a nexus between the persecution he has suffered and . . . political opinion.” (*Id.*). The fear of return had been characterized as relating to criminal matters. PER CURIAM.

Nexus/Central Reason, Post REAL ID, Not Affirmed, El Salvador (2011). The circuit limited application of *Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009). The circuit states: “where, as may be the case here, the persecutors were motivated by an economic or other criminal motive in addition to a protected ground, the petitioner [can] show a nexus. As we held in *Parussimova*, ‘an asylum applicant need not prove that a protected ground was the only central reason for the persecution she suffered,’ as ‘a persecutory act may have multiple causes.’ Moreover, ‘an applicant need not prove that a protected ground was the most important reason why the persecution occurred.” (at 971). The circuit characterized the claim as substantial on the merits.

- ✱ *Aguilar-Ramos v. Holder*, 594 F.3d 701 (9th Cir. 2010) (b) (6); reversing and remanding a claim with regard to protection under the CAT. Respondent had been convicted of robbery in 1990 and “petty theft with priors” in 2003. He was a lawful permanent resident. Finding that review of the denials of asylum and withholding of removal had not been properly preserved to allow their consideration, the court considered only the respondent’s CAT claim. The respondent had “expressed fear that police and gangs will harass, persecute, and kill him because his multiple tattoos and status as a deportee from the U.S. will mark him as a gang member even though he is not.” The Department of State country report had been admitted to the record but had not been specifically mentioned by the Board. The respondent also presented the report and testimony of his expert that he would be at great risk if he was to return. Credibility was not at issue. PREGERSON.

REAL ID Act/Reliance on Prior Case Law. As with *Velasco-Cervantes v. Holder*, (9th Cir. 2010), the court made no reference to the REAL ID Act and relied on pre-REAL ID Act case law, despite the fact that the application was filed after the effective date of the REAL AD Act.

CAT/Country Conditions. “Even if the IJ correctly concluded that Aguilar’s testimony *by itself* was insufficient to meet his burden under CAT, this conclusion would not be dispositive because a CAT applicant may satisfy his burden with evidence of country conditions alone” (emphasis in original). *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001) (holding that a

negative credibility finding for purposes of an asylum claim does not preclude relief under CAT where documented country conditions corroborate a claim of torture”).

CAT/Acquiescence, Not Affirmed, El Salvador (2010). “There is evidence in the record that suggests that gangs and death squads operate in El Salvador, and that its government is aware of and willfully blind to their existence.” *Zheng v. Ashcroft*, 332 F.3d 1186, 1194-95 (9th Cir. 2003) (there is no requirement to show “actual knowledge or willful acceptance of torture; awareness and blindness will suffice”). “We do not mean to suggest that a gang member can never be deported to El Salvador. On remand, we merely hold that the BIA and IJ must consider all the evidence presented by Aguilar and state those conclusions in the record.”

Waiver/212(c). Because respondent had been convicted of an aggravated felony “crime of violence,” he was found ineligible for a waiver under section 212(c), as it does not have a “statutory counterpart with a ground of inadmissibility.” The court cited *Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009) (en banc), upholding *Matter of Brevia*, 23 I&N Dec. 766 (BIA 2003).

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- * *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004) ((b) (6)); remanding without addressing the merits of petitioner’s claim, based on the IJ’s use of an incorrect standard for CAT and withholding; Alien, a “homosexual male with a female sexual identity,” was brutalized by private individuals in El Salvador, and presented documentary materials to support the proposition that the government of El Salvador does not adequately provide protection, “detailing El Salvador’s hostile political and cultural climate towards male homosexuals with female identity.” (at 786); McKEOWN; (BYBEE, concurring, found the IJ had correctly stated the legal standard for acquiescence under CAT, but failed to address whether any public official might have been aware of the activity).

CAT/Acquiescence, Not Affirmed, El Salvador (2004). IJ’s inquiry as to whether petitioner feared torture by someone in the government or acting on behalf of the government, failed to address torture that may be inflicted *with the consent or acquiescence* of the government. (at 787). “If the torture is at the hands of private individuals, the [alien]’s burden is to show the government’s ‘consent or acquiescence,’ . . . [which] is not limited to ‘actual or willful acceptance’; the ‘willful blindness’ of government officials suffices. *Zheng v. Ashcroft*, 332 F.3d 1186, 1194-95 (9th Cir. 2003).” (at 787).

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- * *Rodas-Mendoza v. INS*, 246 F.3d 1237 (9th Cir. 2001) ((b) (6)); (1) determination that applicant’s fear of persecution was unreasonable in light of changed country conditions was supported by substantial evidence, and (2) finding that rape of applicant’s niece, after she came to the US, provided no reasonable basis for fear of persecution was supported by substantial evidence; additionally, fear expressed of a cousin was not found to be “on account of” one of the protected criteria because he was not under “government control” petition denied; SCHROEDER, WALLACE, and TALLMAN; *distinguished by Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004).

Well-Founded Fear/Continued Applicant Presence, El Salvador (2001). Farabundo Marti National Liberation Front (FMLN) member who had been persecuted sporadically between 1978 and 1980, fled to the capital, San Salvador, and continued to participate in FMLN for 11

years without incident, demonstrating that she no longer had a well-founded fear of future persecution.

Persecution/Random Attack, El Salvador. The rape of applicant's niece, who was not an FMLN sympathizer, was isolated, random act of violence that was not motivated by animosity toward FMLN members and provided no reasonable basis for fear of persecution.

- * *Ernesto Navas v. INS*, 217 F.3d 646 (9th Cir. 2000); reversing and remanding upon finding (1) persecution of alien by members of El Salvador's military was on account of political opinion, and (2) Court of Appeals would hold that applicant was statutorily eligible for asylum, rather than remanding to allow BIA to consider country conditions; REINHARDT; distinguished by *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000); *Dinu v. Ashcroft*, 372 F.3d 1041 (9th Cir. 2004); *Molina-Morales v. INS*, 237 F.3d 1048 (9th Cir. 2001); *Gafoor v. INS*, 231 F.3d 645 (9th Cir. 2000).

Persecution/Threats, Not Affirmed, El Salvador (2000); Of Family, Not Affirmed, El Salvador (2000). Applicant suffered "persecution" within meaning of asylum statute where he was threatened with death in El Salvador, two members of his family were murdered, he was shot at, and his mother was beaten.

Political Opinion/Found, El Salvador (2000). Persecution of alien by members of El Salvador's military, including death threats, shooting at him, murdering his aunt and uncle, and beating his mother, was on account of his political opinion. The government conceded that the murder of his uncle was political; his aunt had been married to member of Frente Farabundo Marti para la Liberacion Nacional (FMLN), soldiers who murdered aunt were aware that alien had distributed political materials, and soldiers' actions were not motivated solely by desire to avoid prosecution.

- * *Leiva-Montalvo v. INS*, 173 F.3d 749 (9th Cir. 1999) ((b) (6)); (1) substantial evidence did not support determination of BIA that alien did not suffer persecution in El Salvador on account of his political views; (2) Government failed to rebut presumption that alien had well-founded fear of future persecution; and (3) alien was entitled to withholding of deportation; petition granted; KRAVITCH.

Political Opinion/Found, El Salvador (1999). Substantial evidence did not support determination of BIA that asylum applicant did not suffer persecution in El Salvador on account of his political views; alien testified that "Recontras" harassed, detained, threatened, and shot at him, that they were interested in him because of his older brothers' previous affiliation with El Salvador's guerillas, and that all his discussions with "Recontras" centered on politics and ideology.

Past Persecution/Changed Conditions Not Found, El Salvador (1999); Country Reports/To Rebut Past Persecution, Insufficient, El Salvador (1999). Government failed to rebut presumption that the applicant had a well-founded fear of future persecution; the State Department report describing improvements in El Salvador's human rights record following 1992 Peace Accords did not show that conditions in El Salvador changed significantly between early 1995 and date of hearing.

Past Persecution/Failure to Rebut, El Salvador (1999). Alien was entitled to withholding of deportation to El Salvador, inasmuch as he presented evidence that “Recontras” had specifically threatened his life at least twice, creating presumption that he was entitled to withholding of deportation, and government failed to introduce sufficient evidence of changed country conditions to rebut presumption.

- ✱ *Del Carmen Molina v. INS*, 170 F.3d 1247 (9th Cir. 1999) ((b) (6)); remanding based on unsupported determinations of the BIA that the interest in the applicant shown by guerillas in El Salvador did not amount to persecution, and that any persecution was not “on account of” actual or imputed political opinion; PREGERSON; *distinguished by Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000).

Political Opinion/Imputed, Found, El Salvador (1999). In proceeding on an alien’s applications for asylum and withholding of deportation, determinations of the BIA that the interest in the alien shown by guerillas in El Salvador did not amount to persecution, but rather to an interest by the guerillas in recruiting her, and that any persecution was not “on account of” actual or imputed political opinion, were not supported by reasonable, substantial, and probative evidence; though the alien’s mother and two sisters still resided in El Salvador, there was uncontradicted testimony by the alien that her cousins and their families were killed because the cousins were in the military, that the guerillas had sent applicant threatening notes, and that she did not agree with the guerillas’ opinion.

Eritrea

Chronology

- ✗ *Haile v. Holder*, 658 F.3d 1122 (9th Cir. 2011)
- ✓ *Zehatye v. Gonzales*, 453 F.3d 1182 (9th Cir. 2006)
- ✗ *Nuru v. Gonzales*, 404 F.3d 1207 (9th Cir. 2005)

✓ *Affirmed*

- ✓ *Zehatye v. Gonzales*, 453 F.3d 1182 (9th Cir. 2006) (b) (6); affirming a denial of relief. There was no issue as to credibility. The respondent was a Jehovah's Witness. She did not participate in the 1993 referendum on Eritrean independence and otherwise would not perform military service. As a result, her father's business was "confiscated" and the family lost their housing. There was no claim to any physical abuse. There was the threat, as mentioned in the dissent, that because she would not serve, "the police were planning to take her into custody the very night she fled Eritrea." CALLAHAN. Dissent by BERZON, attacking the IJ ad hominem for being "intemperate."

Country Reports/To Rebut Past Persecution, Sufficient, Eritrea (2006). The majority cited extensively from the Department of State reports to presumably find that the objective component of the claim had not been made out.

Persecution/Economic, Affirmed, Eritrea (2006). The loss of the home and the father's livelihood were found insufficiently egregious (even taking into account the testimony that a sister died of pneumonia due to cramped living conditions) to come within the rule of *Gormley v. Ashcroft*, 364 F.3d 1172, 1178 (9th Cir. 2004) "mere economic disadvantage alone does not rise to the level of persecution."

Persecution/Forced Conscription, Eritrea (2006). The court relied on the Department of State report, which did not establish that Jehovah's Witnesses were singled out because of their religious beliefs. While "conscientious objectors may establish a persecution claim if they can demonstrate that they were selected for mistreatment because of their religious beliefs," *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992), forced conscription or punishment for evasion of military duty generally does not amount to persecution. Although the refusal to serve in the military may be a religious practice, "this alone cannot satisfy the requirement of demonstrating his persecutor's motive or intent." Here there was no evidence of serious or disproportionate punishment for refusing to serve in the military.

✗ *Not Affirmed*

- ✗ *Haile v. Holder*, 658 F.3d 1122 (9th Cir. 2011) (b) (6); reversing a denial of relief under CAT, but affirming denial of relief for asylum and withholding of removal. The

respondent conceded having been a member of the ELF - the Eritrean Liberation Front. This was found to be a "Tier 3" terrorist organization under INA section 212(a)(3)(B)(vi)(3); as such, she was found ineligible as a matter of law. Credibility was not at issue. The circuit does not discuss the charge of removability as being based on membership in a terrorist organization. "As a member of the ELF, Haile 'organiz[ed] women' and 'would gather and collect fund [sic] or contribute fund [sic]' to the ELF. . . . Haile also collected and passed on documents . . . she believed that the documents contained information about how to attack or target the enemy." (At 1124). Respondent had been detained and mistreated by a rival independence organization, the EPLF. She was then asked to marry an EPLF official, which she refused. "Haile believes that because she refused his marriage offer, if she returns anywhere in Eritrea, [the official] would have her killed." (*Id.*). Relief under CAT had been denied because it was found that she has not met her burden to establish the risk she faced was "more likely than not." GOULD

Bars to Asylum/Terrorist Bar, Affirmed, Eritrea (2011). Although the application for asylum had been filed before May 11, 2005, the circuit held that the "amendments to § 1182, which expanded the definitions of terrorist organizations and terrorist-related activities, were given retroactive effect. Thus, the post-REAL ID Act version of § 1182 applies to this appeal." (At 1126 n. 3). "There is documentary evidence in the record, in the form of the MIPT incident profiles, that the ELF carried out several activities described in § 1182(a)(3)(B)(iii), including kidnapping, assassination, bombing, and hijacking." (At 1127). Notwithstanding Haile's objection to this evidence as hearsay, she did "not cast doubt on the probative value or fairness of the evidence presented, nor did she present any contrary evidence." (*Id.*). See, e.g., *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 824 (9th Cir. 2003). "Terrorist activities were perpetrated by the ELF . . . during the period when Haile was an active member, and Haile testified that ELF was engaging in violent activities for the overthrow of the government as late as 2002." (*Id.*). Haile's activities were found to constitute "material support" under 8 USC § 1182(a)(3)(B)(iv)(VI) as this section has a "broad scope." With regard to the exception under this section "if the actor can demonstrate by clear and convincing evidence that he or she did not know and should not reasonably have known that the organization was a terrorist organization," "Subsection (III) [found applicable], which refers to gathering information on potential targets for terrorist activity, does not contain such an exception." (At 1130).

CAT/More Likely Than Not, Found, Eritrea (2011). The Board's analysis was criticized as deficient and "speculative." (At 1131). The circuit cites to *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."). "The evidence of danger to political prisoners who are arrested, as Haile would be if returned, is more than abundant. Even the BIA acknowledged that 'there is background evidence in the record indicating that the Eritrean government has a poor human rights record.' This, however, is an understatement, and one likely to cause grave harm to Haile." *Nuru v. Gonzales*, 404 F.3d 1207, 1218-19 (9th Cir. 2005) (criticizing the human rights situation in Eritrea).

* *Nuru v. Gonzales*, 404 F.3d 1207 (9th Cir. 2005) (b) (6); granting withholding and CAT, and remanding for a discretionary grant of asylum based on finding (1) previous

punishment by military officials constituted torture, (2) alien would likely face similar treatment, and (3) military punishments were torture, not a lawful method of punishment; approvingly cited to by the Attorney General in *Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006); Alien sought relief on the basis of having “voiced his political opposition to the war” to his military superiors during military conflict with the Sudan, for which he suffered significant physical mistreatment as a result thereof. (at 1213). The IJ in denying relief, found him to be a “common deserter” and a “coward,” characterizations that were found by the court to be “impermissible speculation” under *Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 2000); REINHARDT.

CAT/Torture, Found, Eritrea (2005). “The severe form of cruel and inhuman treatment to which Nuru was subjected by the Eritrean army falls well within the definition of torture set forth in the Convention. *See Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001)] (holding that actions that were ‘specifically intended by officials to inflict severe physical pain on [the petitioner]’ constituted torture).” (at 1218). “[P]ast torture is ordinarily the principle factor on which we rely when an applicant who has previously been tortured seeks relief under the Convention,” (at 1218). “[T]he punishment he would likely receive constitutes torture, [and] the fact that he may be punished for desertion rather than, or in addition to his opposition to the Sudanese war, is of no consequence. . . . [T]orture is *never* a lawful means of punishment.” (at 1220, emphasis in original). Hence, while “pain or suffering arising . . . from lawful sanctions” is excluded from CAT, “a government cannot exempt torturous acts from CAT’s prohibition merely by authorizing them as permissible forms of punishment in its domestic law.” (at 1221). “In finding that Nuru was tortured, we also necessarily determined that the acts committed by the military rose to the level of persecution.” (at 1224).

Nexus/Mixed Motive, Pre REAL ID, Eritrea (2005). “Although Nuru’s flight from his country (and possibly the military) might provide a substantial part of the motivation for the persecutory actions in which his government would likely engage on his return, there is little doubt that the political opposition Nuru expressed to the Sudanese war while in the military would also play a part in the future retaliatory conduct.” (at 1229).

CAT/Internal Relocation, Not Affirmed, Eritrea (2005). “[I]t will rarely be safe to remove a potential torture victim on the assumption that torture will be averted simply by relocating him to another part of the country.” (at 1219).

Political Opinion/Found, Eritrea (2005). Even though it was a violation of military discipline to have spoken against the war with Sudan, and all deserters from the army would be subject to punishment; the court still found past persecution and a well-founded fear of future persecution “on account of” actual and imputed political opinion. *See also Barraza-Rivera v. I.N.S.*, 913 F.2d 1443 (9th Cir. 1990) (finding that harm to an applicant drafted into the army and given an order to commit an atrocious act at the pain of significant punishment constituted a well-founded fear of future persecution on account of a protected ground). Accord, *Tagaga v. I.N.S.*, 228 F.3d 1030 (9th Cir. 2000) and *Ramos-Vasquez v. I.N.S.*, 57 F.3d 857 (9th Cir. 1995).

Ethiopia

Chronology

- ✓ *Arsdi v. Holder*, 659 F.3d 925 (9th Cir. 2011)
- ✗ *Mengstu v. Holder*, 560 F.3d 1055 (9th Cir. 2009)
- ✗ *Tekle v. Mukasey*, 533 F.3d 1044 (9th Cir. 2008)
- ✗ *Hadera v. Gonzales*, 494 F.3d 1154, (9th Cir. 2007)
- ✗ *Abebe v. Gonzales*, 432 F.3d 1037 (9th Cir. 2005)
- ✗ *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2005)
- ✗ *Yeimane-Berhe v. Ashcroft*, 393 F.3d 907 (9th Cir. 2004)
- ✗ *Kebede v. Ashcroft*, 366 F.3d 808 (9th Cir. 2004)
- ✓ *Desta v. Ashcroft*, 365 F.3d 741 (9th Cir. 2004)
- ✗ *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000)
- ✓ *Belayneh v. INS*, 213 F.3d 488 (9th Cir. 2000)

✓ Affirmed

- ✓ *Arsdi v. Holder*, 659 F.3d 925 (9th Cir. 2011) (b) (6); upholding a denial of asylum. The only issue discussed is whether the respondent had “exhausted his administrative remedies in challenging an immigration judge’s ruling that he had committed a ‘particularly serious crime’” and hence was ineligible for asylum or withholding of removal. (At 927). The respondent had also sought relief under CAT, but the court dismissed an appeal therefrom in a brief unpublished decision at 2011 WL 5032893. The circuit found that the respondent had “not put the BIA on notice” of this challenge and dismissed his challenge; citing to *Zheng v. Ashcroft*, 388 F.3d 713, 722 (9th Cir. 2004). (At 929). O’SANNLAIN
- ✓ *Desta v. Ashcroft*, 365 F.3d 741 (9th Cir. 2004) (b) (6); upholding IJ’s denial of asylum based on an adverse credibility determination; W.FLETCHER; distinguished by *Elian v. Ashcroft*, 370 F.3d 897 (9th Cir. 2004).

Credibility/Inconsistencies, Material, Affirmed, Ethiopia (2004); Documents to Impeach, Permitted. Substantial evidence supported IJ’s determination that alien’s documents relating to his membership in the AAPO were possibly fraudulent, and that their genuineness went to the heart of his claim. The adverse credibility determination was further supported by material inconsistencies in testimony concerning the extent of his injuries and the circumstances of his wife’s rape.

- ✓ *Belayneh v. INS*, 213 F.3d 488 (9th Cir. 2000) ((b) (6)); upholding denial of asylum based on a determination alien did not have a well-founded fear of persecution and was not deserving of humanitarian asylum; petition denied; THOMAS.

Persecution/Not Rising to Level Of, Ethiopia (2000); Political Opinion/Imputed, Not Found, Ethiopia (2000); Nexus/Motive Not Found, Pre REAL ID, Ethiopia (2000). Substantial evidence supported decision of BIA that Ethiopian asylum applicant did not have well-founded fear of persecution based on her political views or any views imputed to her because of her association with her former husband, who had been colonel under government of Haile Selassie; only persecution suffered by applicant was brief detention over 20 years ago, there was no evidence alleged persecutors imputed to applicant her former husband's views, applicant and former husband had been divorced over 15 years, and government of Ethiopia had changed twice in the interim.

Past Persecution/Humanitarian Asylum, Denied. BIA did not abuse its discretion in denying asylum sought on humanitarian grounds by Ethiopian applicant, inasmuch as she never claimed to have been raped while being detained by authorities, there was scant evidence of attempted rape, she testified to attempted rape only in passing, and, although her adult son had been granted asylum, his claim rested on different factual predicate from hers, and country conditions had changed since his application was granted.

✕ *Not Affirmed*

- ✕ *Mengstu v. Holder*, 560 F.3d 1055 (9th Cir. 2009) ((b) (6)); reversing and remanding a denial of asylum originally based on respondent's failure to demonstrate a lack of "nexus" between a protected ground and the mistreatment complained of. The court found that the respondent, an Ethiopian of Eritrean descent, was in effect denaturalized and obligated to leave Ethiopia at a time of considerable conflict with Eritrea. There was no claim of any physical violence or threat. The IJ found that Mengstu was not subject to past persecution because she had been a "war refugee." The respondent then lived in Sudan for two years before coming to the U.S. without any particular problem after having been legally admitted to the country. The IJ had in the alternative denied relief on the theory of "firm resettlement" in Sudan. NELSON.

Ethnicity/War Refugee, Ethiopia (2009). "The Ethiopian-Eritrean civil war was ethnically tinged." The court cited a number of decisions for the proposition that "persons fleeing or remaining outside of their country for reasons pertinent to refugee status qualify . . . regardless of whether those grounds have arisen during the conflict." *Ndom v. Ashcroft*, 384 F.3d 743, 753 (9th Cir. 2004); *Sinha v. Holder*, 556 F.3d 774 (9th Cir. 2009); *Ahmed v. Keisler*, 504 F.3d 1183, 1195 (9th Cir. 2007); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211 (9th Cir. 2004). "Like the Seventh Circuit, we find it "arguable that such a program of denaturalization and deportation is in fact a particularly acute form of persecution," citing *Haile v. Gonzales*, 421 F.3d 493, 496-97 (7th Cir. 2005).

Bars to Asylum/Firm Resettlement, Not Found, Ethiopia (2009). "DHS bears the initial burden of showing that the government of the third country issued to the alien a formal offer of some

type of official status permitting the alien to reside in that country indefinitely,” citing *Majaraj v. Gonzales*, 450 F.3d 961, 976 (9th Cir. 2006) (en banc); *Ali v. Ashcroft*, 394 F.3d 780, 789-90 (9th Cir. 2005); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 820-21 (9th Cir. 2004) (finding periods of residence of five and sixteen years in a third country without an offer of permanent legal status could not justify a finding of firm resettlement). The IJ’s finding was reversed because “the government did not meet this burden.”

- ✱ *Tekle v. Mukasey*, 533 F.3d 1044 (9th Cir. 2008) (b) (6); reversing and remanding a denial of relief. The respondent sought relief based on her activities with the Oromo Liberation Front for which she reported significant abuse. The IJ gave 8 reasons for finding her incredible in what he described as a “herculean” well over 75 minute oral decision. (at 1056). He also made comments about the court’s credibility case law, which was disputed upon its review. FLETCHER, W.

Credibility/Opportunity to Explain; Hesitant to Respond; Implausibility, Not Affirmed, Ethiopia (2008); Discrepancy, Dates. The court rejected several reasons cited by the IJ for disbelief that the application was filed close to the one year filing deadline. Those reasons included the respondent having “deferred, delayed, or hesitated before answering certain questions,” the respondent mixing up the dates between the western and Ethiopian calendars, and the IJ’s belief that certain events were inherently implausible. (at 1052 n.3). An inconsistency relied upon could not stand in that an opportunity was not extended to “explain” such. Similarly, the court did not find that an inability to accurately restate certain terms that may reasonably be interrelated in a lay person’s mind, such as “arrest” and “custody,” constituted a justifiable basis for an adverse credibility determination.

- ✱ *Hadera v. Gonzales*, 494 F.3d 1154 (9th Cir. 2007) (b) (6); reversing and remanding based on the designation of the country of removal. The respondent argued that he was stateless. He had been born in Italy to parents of Ethiopian nationality. His parents had listed him as a citizen of Ethiopia on documents submitted to the government, including his successful application for lawful permanent residence. He had never actually been to Ethiopia and had traveled to the U.S. from Italy. However, Italy does not accord citizenship to those simply born there. FERGUSON.

Country of Removal/Designation. “[A]n IJ must assign a country of removal.” (at 1156). When the respondent declines to designate a country of removal (step 1), the IJ must designate a country of removal by designating the country under 8 U.S.C. § 1231(b)(2)(D) of which the Respondent was: “a subject, national, or citizen” of the country (step 2). (at 1156). Only in the event that no country meets that definition may the IJ designate a country where the respondent has a “lesser connection” under step 3. (at 1157). The court concluded that “the only country that would have met any of these descriptions [of a lesser connection] is Italy.” (at 1158). One cannot “presume the petitioner’s citizenship without making a factual finding on that issue.” (at 1159).¹⁹

¹⁹ In *Mendis v. Filip*, 554 F.3d 335 (2d Cir. 2009), the Court remanded the IJ’s designation of a country where the respondent refused to designate. The IJ designated the United Kingdom because

Step 4 of Designation. Under *Jama v. ICE*, 543 U.S. 335 (2005), the IJ may only reach step 4 if no country meets the requirements for a designation under steps 1 through 3. (at 1157). In that event, the IJ may designate “another country whose government will accept the alien into that country.” *Id.* (at 1157). The court noted that if Italy rejected Hadera or if removal to Italy proved to be impracticable, inadvisable, or impossible, “the IJ might re-designate Ethiopia under step 4.” (at 1159). “Under step 4, Ethiopia would have to agree in advance to accept Hadera prior to such designation.” (at 1159 n.2).

- ✱ *Abebe v. Gonzales*,²⁰ 432 F.3d 1037 (9th Cir. 2005) (en banc), rev’g 379 F.3d 755 (9th Cir. 2004) (b) (6); reversing en banc a panel decision, which had upheld a denial of relief in a case based on the risk of infliction of female genital mutilation (FGM) to a United States citizen daughter. Notwithstanding the court’s holding on the FGM issue, it went out of its way to evaluate the “political persecution argument” and to find that the denial on that basis was “supported by substantial evidence.” The case was remanded and the court stated that “we do not reach the issue of whether Petitioners, parents of a U.S. citizen child likely to face persecution in her parents’ native country, may derivatively qualify for asylum.” CLIFTON.

Respondent had last been in a London airport on his travel to the United States. There was no basis to believe that respondent had legal status in the United Kingdom. The Court stated, “We conclude that section’s 1231(b)(2)(E)(i) country from where the alien was admitted to the U.S and 1231(b)(2)(E)(ii) country in which is located the foreign port from which the alien left for the U.S. are ambiguous and neither authorizes Mendis’ removal to the U.K. . . . We remand to the BIA so that it may issue a precedential decision that identifies the statutory basis for Mendis’ removal to the U.K.” See also *Dzyuba v. Mukasey*, 540 F.3d 955 (9th Cir. 2008) (involving the Court’s refusal to accept the IJ’s country designation where the respondent declined to do so).

²⁰ This decision is not consistent with *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007). The Board held that the risk of FGM to a USC daughter would not give rise to a successful claim by a parent thereupon. The *Abebe* decision came out of the Portland Immigration Court. After the Ninth Circuit remand, the Board in turn remanded the case back to Immigration Judge Bennett of that court. On December 19, 2007, he granted asylum and the DHS did not appeal. This was so notwithstanding *A-K-* having been issued on September 5, 2007. That decision came within the Fifth Circuit and it does not refer to *Abebe*. Additionally, in *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008), the Board held that FGM constitutes past persecution and reversed a denial of relief. The IJ there made an adverse credibility finding and questioned the bona fides of the proffered medical documents. Moreover, he held that because the procedure would not be done again, the respondents could not have a well-founded fear of future persecution. In distinguishing *A-K-*, Judge Bennett noted case law that persecution to an applicant’s close family member may constitute persecution as to the applicant directly. *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004); *Molina-Estrada v. I.N.S.*, 293 F.3d 1089, 1095 (9th Cir. 2002); *Salazar-Paucar v. I.N.S.*, 281 F.3d 1069, 1075 (9th Cir. 2002); *Mgoian v. I.N.S.*, 184 F.3d 1029, 1036 (9th Cir. 1999); etc. In *A-K-*, the Board found that the USC daughters would not likely experience FGM in Senegal – the country of citizenship of the applicant. Additionally, they could remain in the U.S. with the parent who was not in proceedings. In *Abebe*, this was not so. The Board rejected the argument that the parent could obtain asylum on the psychological suffering from the child’s being obligated to have FGM. That would be different from a case based on intentional psychological harm to the asylum applicant as being, for example, done through the involuntary FGM on a daughter.

Derivative Claims/Asylum. Although not explicitly discussed by the majority, this decision must be viewed as an extension of *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. Apr. 21, 2005), vacated and remanded by 127 S. Ct. 57 (2006). As pointed out by the dissent, the suggestion of the BIA doing anything under the present facts but granting asylum upon the remand is “illusory” in that “the majority implicitly assumes that the parents of a U.S. citizen child are nonetheless entitled to claim derivative asylum relief based on the possibility that their citizen child would be subjected to FGM... Although the practice of FGM is considered persecution under our law there is no threat here since a U.S. citizen child cannot be deported to the country of parents’ birth, and the parents cannot claim an unrecognized form of derivative relief when they themselves cannot establish entitlement to asylum.” This point of view is underscored by the majority’s rejection of the “political persecution argument” which formed the only other part of the request for asylum.²¹

Political Opinion/Imputed, Not Found, Ethiopia (2005); Nexus/Motive Not Found, Pre REAL ID, Ethiopia (2005). The lead respondent’s parents were supporters of the Derg government of Ethiopia. After it was overthrown, they had been imprisoned by the present government for “two weeks and were denied their civil rights, including the right to vote.” With the exception of one sibling who was “an active Derg supporter,” other siblings have remained in Ethiopia largely without incident.” The lead petitioner had received a scholarship to study abroad under the Derg, but under the current government his “passport was renewed so that he could remain abroad and continue to take advantage of the scholarship.” The lead respondent after coming to the U.S. joined “a political organization that opposes the” present government and in doing so “attended meetings, helped recruit members, and attended a conference.” Because he had not received any specific threats as a result of the above, the court found that he failed to demonstrate that he “would be persecuted because of his actual or imputed political activities.”

Persecution/FGM. Although the respondent had made it clear that they would not want their daughter to be subjected to FGM; the facts that the Department of State materials reflected a high proportion of women having FGM and that the family would be “rejected...if she opposed this ritual” more than met the 10% test of a future risk.

* *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2005) (b) (6)). See **Somalia** (Somali refugees refuted resettlement in Ethiopia).

²¹ *Kone v. Holder*, 620 F.3d 760 (7th Cir. 2010), involved an untimely asylum claim. The respondents were husband and wife and were concerned of the risks of the wife’s FGM on their USC daughter. The Board denied relief on the basis that parents cannot establish their claim on a derivative basis from the risk to their child. The circuit relied on *Kone v. Holder*, 596 F.3d 141, 143 (2d Cir. 2010) and *Abay v. Ashcroft*, 368 F.3d 634, 636 (6th Cir. 2004) which state that the risk of prospective FGM to a child can be a basis of relief to the parent. See also *Hassan v. Gonzalez*, 484 F.3d 513, 519 (8th Cir. 2007). *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2010), was cited to support the position that persecution of an immediate family member “could constitute persecution of him.” The successor case, *Gatimi v. Holder*, 606 F.3d 344, 349 (7th Cir. 2010) (both involved the risk of FGM where administrative denials were not upheld) “persecution of Mrs. Gatimi can constitute persecution of Mr. Gatimi and so her fear of persecution is relevant to his and therefore to their claim for asylum.” Thus, FGM was found to be a “way to punish one.”

- * *Yeimane-Berhe v. Ashcroft*, 393 F.3d 907 (9th Cir. 2004) (b) (6); remanding to the IJ after reversing an adverse credibility determination based solely on the submission of a counterfeit hospital report; TASHIMA.

Credibility/Documents to Impeach, Rejected. An adverse credibility determination cannot be made solely because the alien submitted a counterfeit document, when there is no evidence the alien knew the document was counterfeit. (at 912).

Persecution/Detention, Not Affirmed, Ethiopia (2004); Rape; Physical Harm, Not Affirmed, Ethiopia (2004). Alien claimed past persecution based on her participation in the All-Amhara People's Organization (AAPO). She was arrested with other demonstrators in 1993 and detained for a month under harsh conditions (fed only once a day and not permitted to use restrooms). In June 1994, soldiers disrupted an AAPO meeting, arrested her, and detained her for six months, during which time she was interrogated regarding her involvement and beaten four or five times, as well as raped. She was hospitalized after an attempted suicide and released on bond when a family friend signed a document. A warrant was subsequently issued for her arrest.

Credibility/Documents to Impeach, Permitted. Applicant presented an outstanding warrant for having jumped bail and a certificate from the hospital. INS Forensics concluded the hospital certificate was counterfeit, but didn't challenge the authenticity of the warrant for petitioner's arrest. The court noted that in *Akinmade v. INS*, 196 F.3d 951, 955-56 (9th Cir. 1999), it was held that the use of fraudulent documents to gain entry into the United States could not serve as a basis for an adverse credibility determination because the documents were merely incidental to the claim. "It does not follow from this holding, however, that the converse is necessarily true—that is, that the use of one allegedly fraudulent document that may go to the heart of an asylum claim automatically is determinative of an adverse credibility finding, especially when there is no indication or finding by the IJ that the petitioner knew the document was fraudulent." The use of a fraudulent document may lend support to an adverse credibility finding, but is insufficient alone. (at 911).

- * *Kebede v. Ashcroft*, 366 F.3d 808 (9th Cir. 2004) (b) (6); reversing IJ's adverse credibility determination and remanding to determine if past persecution was so atrocious as to make alien eligible for asylum even though there was little likelihood of future persecution; petition granted and remanded; GOODWIN.

Credibility/Shame. Unwillingness to discuss her rape or to report it in her asylum interview and application could not form the basis of an adverse credibility determination when she stated she was "embarrassed" to have done so. (at 809). This was so even with what was considered by the court to have been "minor memory lapses and inconsistencies on issues at the periphery of her asylum claim." None of the proffered reasons seriously call into question the fact and nature of alien's rape.

Nexus/Motive Found, Pre REAL ID, Ethiopia (2004). Soldier's statement during the rape that alien was getting her due because "You had your time in the previous government," combined with a regular program of searching the family, was sufficient evidence that the attack was at

least in part motivated by alien's family's authority and position in the Selassie regime and that this was not an isolated incident.

Past Persecution/Ethiopia, Changed Conditions Not Found, Ethiopia (2004). "A petitioner may be eligible for asylum on the basis of past persecution alone, 'even where there is little likelihood of future persecution.' *Acewicz v. INS*, 984 F.2d 1056, 1062 (9th Cir. 1993)." (at 812). A finding of changed country conditions to justify denial was not accepted even though the regime that had engaged in the persecutory acts had long since been overthrown.

- * *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000) ((b) (6)); remanding after finding alien's rape by government official was motivated at least in part by her ethnicity; PREGERSON; (WALLACE, dissenting, argued that circuit precedent allowed implicit adverse credibility findings, and that here the IJ made a partial adverse finding, going specifically to the basis for the rape).

Nexus/Motive Found, Pre REAL ID, Ethiopia (2000); Persecution/Rape, Ethiopia (2000); Ethnicity/Not Affirmed, Ethiopia (2000). Rape of alien by government official of Tigrean ethnicity was motivated at least in part by applicant's Amharic ethnicity, and applicant thus was persecuted "on account of" ethnicity; she gave uncontroverted and credible testimony that she was raped because she was Amharic, no evidence supported conclusion of IJ that her testimony was speculative, and her testimony was corroborated by her sister's testimony and by documentary evidence.

Past Persecution/Individualized Analysis, Ethiopia (2000). Presumption that asylum applicant was eligible for asylum, created by finding of past persecution, could be overcome only by individualized analysis of her situation which would demonstrate that changed conditions in her country of origin had eliminated the basis for her individual fear of future persecution.

Fiji

Chronology

- ✖ *Ali v. Holder*, 637 F.3d 1025 (9th Cir. 2011)
- ✖ *Sinha v. Holder*, 556 F.3d 774 (9th Cir. 2009)
- ✖ *Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006)
- ✓ *Kumar v. Gonzales*, 439 F.3d 520 (9th Cir. 2006)
- ✖ *Narayan v. Ashcroft*, 384 F.3d 1065 (9th Cir. 2004)
- ✖ *Faruk v. Ashcroft*, 378 F.3d 940 (9th Cir. 2004)
- ✖ *Lal v. INS*, 268 F.3d 1148 (9th Cir. 2001)
- ✖ *Gafoor v. INS*, 231 F.3d 645 (9th Cir. 2000)
- ✖ *Tagaga v. INS*, 228 F.3d 1030 (9th Cir. 2000)
- ✖ *Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000)
- ✓ *Lata v. INS*, 204 F.3d 1241 (9th Cir. 2000)
- ✓ *Kumar v. INS*, 204 F.3d 931 (9th Cir. 2000)
- ✓ *Pal v. INS*, 204 F.3d 935 (9th Cir. 2000)
- ✓ *Singh v. INS*, 134 F.3d 962 (9th Cir. 1998)
- ✖ *Prasad v. INS*, 101 F.3d 614 (9th Cir. 1996)
- ✖ *Surita v. INS*, 95 F.3d 814 (9th Cir. 1996)
- ✖ *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996)

✓ *Affirmed*

- ✓ *Kumar v. Gonzales*, 439 F.3d 520 (9th Cir. 2006) (b) (6); affirming a denial of relief. The respondents consisted of a family who were ethnic Indian. Mr. Kumar testified that he had been active in the Labor Party. Around the time of the 1987 coup, he “was punched in the stomach and around his face and verbally abused. He testified that he still has scars from this incident. One of the soldiers grabbed and squeezed Mrs. Kumar.” In the 1991 incident, Mr. Kumar testified that he was insulted and could no longer practice his religion outside of his home. In a 1994 incident, Mr. Kumar testified that he felt that he was the subject of a deliberate automobile accident because of his race. The majority found that, even with the cumulative effect of all the incidents, neither past persecution nor a well-founded fear of future persecution had been established. SILVERMAN. There was a dissent by WARDLAW which found the events to constitute past persecution.

Persecution/Not Rising to Level Of, Fiji (2006); Ethnicity/Affirmed, Fiji (2006). The court cited cases of the proposition that “persecution is an extreme concept that does not include every sort of treatment our society regards as offensive.” *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995). “While the ethnic slurs and physical confrontations the Kumars endured are regrettable, the evidence presented does not compel reversal.” The decision refers to other holdings denying

Fijian claims: *Prasad v. INS*, 47 F.3d 336 (9th Cir. 1995) and *Singh v. INS*, 134 F.3d 962 (9th Cir. 1998).

- ✓ *Lata v. INS*, 204 F.3d 1241 (9th Cir. 2000) (b) (6); upholding denial of asylum based on findings that (1) alleged incident in which alien was accosted by native Fijians could not alone support her asylum claim, and (2) alien was not prejudiced by alleged ineffective assistance of paralegal; petition denied; O'SCANNLAIN.

Credibility/Inconsistencies, Material, Affirmed, Fiji (2000). Adverse credibility finding with regard to alien seeking asylum was supported by significant and relevant discrepancies between her asylum application, in which she alleged a group of youths accosted her for money and threw rocks at her, and her later testimony at evidentiary hearing that two men prepared to assault her sexually, and that she fled without being chased or having rocks thrown at her. "The only explanation that Lata offers for the discrepancy in the testimony is the embarrassment she felt at revealing the sexual nature of the second version in front of her family. At the evidentiary hearing, Lata was able to testify outside the presence of her family members; presumably she could have filled out her asylum application privately also, or offered an explanation of why she could not. She was also interviewed by the INS pursuant to her written asylum application, which provided her with an opportunity to amend her written statement, again outside the presence of her family if she so wished. Even if we were to find Lata's explanation for the discrepancy in her two stories plausible, the IJ was clearly justified in questioning her credibility based on these two very different narratives. Lata's explanation can hardly be characterized as compelling the opposite result." (at 1245).

Well-Founded Fear/Continued Applicant Presence, Fiji (2000). Alleged incident in which Fijian of Indian descent was accosted by native Fijians could not alone support her asylum claim, where she did not leave Fiji until many months after alleged incident occurred, she was never again troubled by native Fijians, and her sister continued to live without difficulty in same town.

Persecution/Generalized Violence, Fiji (2000); Not Rising to Level Of, Fiji (2000). General claims by Fijian of Indian descent of broad ethnic tension across Fijian society did not establish the persecution required for asylum claim.

- ✓ *Kumar v. INS*, 204 F.3d 931 (9th Cir. 2000) (b) (6); upholding denial of asylum based on findings that (1) changed country conditions rebutted any presumption that alien possessed well-founded fear of future persecution, and (2) alleged incidents of persecution were not so severe as to constitute atrocious persecution that would override changed country conditions; petition denied; O'SCANNLAIN; *distinguished by Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000).

Past Persecution/Humanitarian Asylum, Denied. Alleged incidents of persecution of Fijian based on her Indian descent and political beliefs, consisting of soldiers stripping her in front of her parents and fondling her, threatening to kill her, dragging her from Hindu temple and demanding at gunpoint that she change her religion, and knocking her unconscious, were not

so severe as to constitute atrocious persecution that would override changed country conditions so as to warrant grant of asylum for humanitarian reasons.

- ✓ *Pal v. INS*, 204 F.3d 935 (9th Cir. 2000); upholding denial of asylum based on (1) finding that alien did not credibly establish eligibility for asylum were supported by substantial evidence, and (2) BIA did not violate alien's due process rights when it rested its decision on certain grounds not referenced by IJ; petition denied; O'SCANNLAIN; *distinguished by Mendoza Manimbao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2003).

Credibility/Documents to Impeach, Permitted. Finding of BIA, that alien did not credibly establish eligibility for asylum based on alleged persecution in Fiji on account of her Indian descent, Hindu religion, and support for Labor Party, was supported by substantial evidence, including contradictions between her testimony and doctor's letter as to when alleged rape occurred, and fact that, although same doctor purportedly wrote letters for alien and her husband, the signatures were strikingly different.

Credibility/Inconsistencies, Material, Affirmed, Fiji (2000). Finding of BIA, that alien did not credibly establish eligibility for asylum based on alleged persecution in Fiji on account of her Indian descent, was supported by substantial evidence, including contradictions in her testimony as to when her jaw was broken by native Fijians. "Mrs. Pal claimed that her attackers were members of the military based only on the fact that they were carrying weapons. But her attackers were not wearing uniforms and during the turmoil following the coup, many individuals other than members of the military were likely carrying weapons. Moreover, though Mrs. Pal stated that the reason the military men who attacked her were not wearing uniforms was fear of getting reported, she simultaneously insisted that members of the military would never get in trouble even if reported." (at 938).

- ✓ *Singh v. INS*, 134 F.3d 962 (9th Cir. 1998) (b) (6); upholding denial of asylum based on finding that alien did not suffer persecution on account of her Indian origin or Hindu faith; petition denied; RHOADES; *distinguished by Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000).

Persecution/Generalized Violence, Fiji (1998). "Mere generalized lawlessness and violence between diverse populations, of the sort which abounds in numerous countries and inflicts misery upon millions of innocent people daily around the world, generally is not sufficient to permit the Attorney General to grant asylum to everyone who wishes to improve his or her life by moving to the United States without an immigration visa." (at 967). Evidence did not compel finding that alien suffered persecution in Fiji on account of her Indian origin or Hindu faith that would entitle her to asylum; ethnic Fijians' alleged acts of throwing rocks at her house and stealing her property were not severe, alien did not leave Fiji until five years after coup which established regime favoring ethnic Fijians, and alleged destruction of alien's temple was not directed toward her individually.

Persecution/Not Rising to Level Of, Fiji (1998); Discrimination, Affirmed, Fiji (1998). "Persecution" upon which asylum can be based does not require bodily harm or threat to life or liberty, but it is an extreme concept that does not include every sort of treatment our society

regards as offensive. Discrimination on basis of race or religion, as morally reprehensible as it may be, does not ordinarily amount to “persecution” upon which asylum can be based.

Well-Founded Fear/Continued Applicant Presence, Fiji (1998). “Moreover, the record indicates that Petitioner’s circumstances in Fiji were not so severe that she had to flee; indeed, she waited until five years after the coup to leave. In fact, Petitioner has admitted that when she left Fiji she intended to return, but when she arrived in the United States she liked it here and decided to stay. (A.R. at 49.) One would expect that if Petitioner truly had experienced persecution, she would have left the country earlier and would have not intended to return. Significantly, Petitioner has stated that she left Fiji not because of persecution, but primarily because of a lack of educational and employment opportunities for her daughter.” (at 969).

✕ ***Not Affirmed***

- ✕ ***Ali v. Holder*, 637 F.3d 1025 (9th Cir. 2011)** (b) (6); reversing a denial of relief. The circuit found that the alien, an Indo-Fijian, had established past persecution. Credibility was not at issue. The claim had been denied on the basis of changed country conditions. THOMAS.

Changed Country Conditions/Changed Conditions Not Found, Fiji (2011). The administrative decision relied on favorable statements as to the status of Indo-Fijians in the State Department country report. The circuit found that this did not meet the required “individualized determination” test. “Where past persecution has been established, *generalized* information from a State Department report on country conditions is not sufficient to rebut the presumption of future persecution.” (at 1030, emphasis in the original, citing *Kamalyan v. Holder*, 620 F.3d 1054, 1059 (9th Cir. 2010)). The administration had found that: “While ethnic discrimination remains a serious problem in Fiji, the respondent has failed to demonstrate that he is at particular risk or that his predicament is appreciably different from the dangers faced by his fellow Indo-Fijians.” (at 1031).

Motion to Reopen/Changed Circumstances, Not Affirmed, Fiji (2011). The circuit also reversed a denial of a motion to reopen (“MTR”). The alien had entered the United States in 1989 and the basis of his claim arose from prior events. The MTR was based on a 2006 coup and included a number of materials pertaining to human rights abuses. The administrative decision had noted that the alien had “not shown how the military persons he was persecuted by are connected in any way to the current military regime or why he has an independently objective basis for fearing this new regime.” (at 1032). The circuit found that this determination was erroneous given the prior finding of past persecution.

- ✕ ***Sinha v. Holder*, 556 F.3d 774 (9th Cir. 2009)** (b) (6); reversing and remanding a denial involving a claim by an Indo-Fijian who had reported acts of violence directed at him and his family by ethnic Fijians. Credibility was not at issue. The IJ denied relief on several bases, including the lack of a “nexus” to a protected ground. The Court rejected the IJ’s conclusion that the violence was “random” as unsupported. BERZON.

Nexus/Motive Found, Pre REAL ID, Fiji (2009). “The use of ethnic slurs in the course of an attack “amply establishes the connection between the acts of persecution and ethnicity.” Citing *Baballah v. Ashcroft*, 367 F.3d 1067, 1077 (9th Cir. 2003).

Particular Social Group/Disfavored Group, Not Affirmed, Fiji (2009); Well-Founded Fear/Pattern or Practice, Not Affirmed, Fiji (2009). “Under 8 C.F.R. 208.13(b)(2)(iii), if an asylum applicant can show that there is a sufficiently systematic ‘pattern or practice’ of persecuting members of the protected group to which he belongs in his home country, he need not show evidence of a particularized threat to him to make out a well-founded fear of future persecution.” See *Quan v. Gonzales*, 428 F.3d 883, 889 (9th Cir. 1999); *Knezevic v. Ashcroft*, 367 F.3d 1206 (9th Cir. 2004); *Mgoian v. INS*, 184 F.3d 1029, 1035 (9th Cir. 1999) . . . Evidence of the pervasive mistreatment of an oppressed ethnic group makes it easier, not harder, for an individual member of that group to meet his burden of showing that there is at least a ten percent chance that he will be individually targeted in the future. *Chand v. INS*, 222 F.3d 1066, 1076 (9th Cir. 2000).”

Persecution/Of Family, Not Affirmed, Fiji (2009); Of Friends or Affiliates, Fiji (2009). “Harm to a petitioner’s close family members or associates may be relevant to assessing whether the petitioner suffered past persecution. *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9th Cir. 2004), *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998).”

✱ ***Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006) (en banc) (b) (6)**; reversing a denial of relief by a panel, 416 F.3d 1088 (9th Cir. 2005), and remanding. The panel had found that a four-year period of legal residence in Canada constituted “firm resettlement.” The family had applied for asylum but left before their application was acted upon because “they believed the grass was greener on the other side of the border.” The parents had received significant physical trauma including breaking “two of his ribs” and the wife being raped because of their asserted political activities.; RYMER.²² **Dissent by O’SANNLAIN.**²³

²² In *Liao v. Holder*, 558 F.3d 152 (2d Cir. 2009), the Second Circuit reversed a finding of “firm resettlement” where the alien was legally admitted and allowed to live for a five-month period in a third country.

²³ The Board cites *Maharaj* in *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011) which sets forth “its framework for making firm resettlement findings.” This decision comes out of the Sixth Circuit. The Board notes that the circuit courts have adopted either the “direct offer approach” or the “totality of the circumstances approach.” The Sixth Circuit is not found to be in either. The Ninth Circuit is placed in the former. The Ninth Circuit found that the existence of an offer was the exclusive means of establishing firm resettlement.” *Id.* at 497. It further cited *Su Hwa She v. Holder*, 629 F.3d 958 (9th Cir. 2010). There, a citizen of Burma obtained Taiwanese citizenship and a passport that was used to come to the U.S. The basis of her asylum claim was from events in Burma as opposed to any claim from Taiwan. Even “direct evidence of naturalization may not be sufficient to establish firm resettlement where the alien’s credible testimony could refute the significance of naturalization. The alien claimed that she fraudulently obtained her Taiwanese passport and she only stayed in Taiwan as long as necessary to arrange further travel.” *Id.* at 497.

The Board does not cite the *Maharaj* decision as having been an en banc reversal of an initial panel publishing holding which would have upheld the denial of relief on the basis of finding firm resettlement. Nor does it speak to whether it is refusing to follow Ninth Circuit case law in cases from

Dissent. O'Scannlain, the author of the panel decision, agreed that a remand to consider changed country conditions in Fiji was warranted with respect to the Maharajs' request for withholding of removal. But he restated his former belief that there had been firm resettlement in Canada and that the majority's decision "invites abusive country shopping." He then went on to note the practical impossibility of the DHS ever meeting the evidentiary standard set forth by the majority to establish firm resettlement. "Simply, the majority's construct will hamstring DHS to an intolerable and unreasonable degree in future asylum proceedings."

Bars to Asylum/Firm Resettlement, Not Found, Fiji (2006). The DHS has to make at least a prima facie showing "that the alien had an offer of some type of official status permitting him to reside in the third country indefinitely." If that showing is made, the burden then shifts to the alien to show that he is not firmly resettled.

Past Persecution/Individualized Analysis; Country Reports, Use Of Rejected, Fiji (2009); Country Reports/To Rebut Past Persecution, Insufficient, Fiji (2009). The panel had upheld the finding that the claim should be denied on the basis of changed country conditions. As to the father, the panel noted that he "failed to show that his minor role in an election 18 years ago . . . would motivate similar persecution today and the Country Reports contain evidence of a significant lessening of political and racial tension since 2000." Nevertheless, the en banc court held that the Board did not make "make an individualized determination as to the effect of country conditions." The general reference to the Department of State country reports was not found to be adequate.

- * *Narayan v. Ashcroft*, 384 F.3d 1065 (9th Cir. 2004) (b) (6); remanding after finding evidence compelled conclusion that acts against alien cumulatively amounted to persecution and BIA had failed to separately address alien's motion to remand for consideration of newly available evidence of worsened country conditions; HAWKINS; distinguished by *Circu v. Ashcroft*, 389 F.3d 938 (9th Cir. 2004).

Persecution/Cumulative Effect, Fiji (2004). Fijian of East Indian descent who was attacked, robbed, stabbed on two occasions, and "bashed" by ethnic Fijians, was refused help by the police or treatment at the hospital; such physical harm, suffered on more than one occasion, compels a finding that the acts against him cumulatively amounted to persecution. See *Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000).

this Circuit. The Board concludes: "we disagree with the IJ's determination that the respondent was not firmly resettled because he did not apply for status in Senegal. The failure to apply for permanent residence where it is available to an alien does not rebut evidence of firm resettlement." *Id.* at 504. It would appear that the Board's point of view is similar to that of the panel decision which was reversed by the court en banc.

In *Matter of D-X-*, 25 I & N Dec. 664 (BIA 2012) the Board extended its analysis of *Matter of A-G-G-*. This case arose in the Ninth Circuit. The IJ's finding of no firm resettlement was reversed. The Board found that a citizen of China who had been provided a "Permit to Reside in Belize" which provided an opportunity to indefinitely legally live, work, and return thereto constitutes "prima facie evidence of firm resettlement" which was not rebutted. This was so notwithstanding the permit allegedly having been obtained by fraud. It is very important to note that in this case the respondent had in fact used the permit to not only acquire documents to legally enter the US but also in making a lawful return to Belize. Further, "She did not claim to have faced any harassment, discrimination, or persecution in Belize."

- ✱ *Faruk v. Ashcroft*, 378 F.3d 940 (9th Cir. 2004) ((b) (6)); remanding for the IJ to consider harm inflicted by applicants' relatives, whom the government was unwilling or unable to control; B.FLETCHER.²⁴

Unable or Unwilling to Control/Family as Source. "There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it. See *Rodas-Mendoza v. INS*, 246 F.3d 1237, 1239–40 (9th Cir. 2001)." (at 943).

Persecution/Cumulative Effect, Fiji (2004). The cumulative effect of the threats and attacks on interracial couple— including being abducted, beaten, physically attacked, verbally assaulted, assailed with rocks, losing his job, denied a marriage certificate, and seriously and repeatedly threatened—is sufficient to establish past persecution.

- ✱ *Lal v. INS*, 268 F.3d 1148 (9th Cir. 2001) (amending 255 F.3d 998 (9th Cir. 2001) on reh'g) ((b) (6)); remanding based on finding that mistreatment suffered by asylum applicant and his family rose to the level of severity required by *Matter of Chen*; and changed country conditions information in the record was insufficient to rebut the presumption of fear of future persecution that arose once asylum applicant, an Indo-Fijian, had demonstrated past persecution; B.FLETCHER; (O'SCANNLAIN, dissenting, urges deference to the BIA's permissible construction of its own asylum regulation and that the BIA's denial of asylum was supported by substantial evidence).

Persecution/Detention, Not Affirmed, Fiji (2001); Sexual Assault; Physical Harm, Not Affirmed, Fiji (2001). Based on the severity of the persecution alien's family faced in Fiji, asylum application was properly considered under the *Matter of Chen* rule, which waived the requirement that an individual who has suffered past persecution must also demonstrate a well-founded fear of future persecution; family members endured repeated arbitrary detentions, painful and humiliating torture, sexual assault, threats, and severe intimidation on the basis of their political opinion and religious beliefs, and suffered the horror of attempting to escape but finding their way barred by government blacklists.

Past Persecution/Fiji, Changed Conditions Not Found, Fiji (2000); Failure to Rebut, Fiji (2001). Changed country conditions information in the record was insufficient to rebut the presumption of fear of future persecution that arose once asylum applicant, an Indo-Fijian, had demonstrated past persecution; although abuses of Indo- Fijians in Fiji may not have been

²⁴ In *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), the Board discussed the long history of the *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) litigation on asylum being sought in domestic violence claims. It now holds that in the context of a married Guatemalan woman who experienced severe physical abuse at the hands of her husband that she would be deemed to be a member of a particular social group of "married women in Guatemala who are unable to leave their relationship." 26 I&N Dec. at 389. The Board finds that the proposed group "share the common immutable characteristic of gender. . . . Moreover, marital status can be an immutable characterisitic where the individual is unable to leave the relationship. . . . Supporting the existence of social distinction . . . Guatemala has a culture of 'machismo and family violence.'" *Id.* at 392-93 (citations omitted).

widespread or may not have formed a clear pattern, evidence indicated that applicant and his family were among the unlucky few who were most vulnerable to abuse.

Past Persecution/Individualized Analysis, Fiji (2009). “In such a situation, the BIA must ask whether the INS has shown through record evidence that the individual who suffered past persecution is among the general population that is not suffering from a ‘sustained pattern’ of human rights violations, or whether the applicant is among the unlucky few who are most vulnerable to abuse. Such an assessment must take account of the specific attributes of the past persecution on record. *See Chand*, 222 F.3d at 1079. In this case, there is abundant evidence that Mr. Lal was well-known as a leader and organizer for the Labor Party because of his prominent organizing work during the 1987 elections. In addition, we know from the record that Mr. Lal is not among those Indo-Fijians who were attacked at random in the aftermath of the coup. Instead, he was specifically sought at his home by government representatives, taken into detention, and tortured. Members of his family were attacked and harassed. Nor did the abuse cease during Fiji’s peaceful periods. Instead, Mr. Lal was sought and detained several times, even though he was no longer working as an organizer. His renown was such that his name was placed on a government blacklist. Perhaps most importantly, these events spanned a four year period. Like the applicant in *Chand*, then, Mr. Lal ‘has shown that he has continued to face significant problems in the years after the coup, even after the general conditions improved substantially.’ *Id.*” (at 1011).

- ✱ ***Gafoor v. INS*, 231 F.3d 645 (9th Cir. 2000)** (b) (6); (1) persecution by ethnic Fijian soldiers was motivated, at least in part, by protected grounds of race and imputed political opinion; (2) case would be remanded for reconsideration of changed country conditions in light of events that occurred in Fiji in 2000; and (3) Court of Appeals would take judicial notice of such events; remanded with instructions; HAWKINS; (O’SCANNLAIN, dissenting, discussed Congressional intent regarding the required showing of causation in asylum cases, also arguing that there should be no “recent events” exception to the review of facts on the record).

Persecution/Detention, Not Affirmed, Fiji (2000); Physical Harm, Not Affirmed, Fiji (2000). Actions by ethnic Fijian soldiers of assaulting Indo-Fijian policeman in front of his family, holding him captive for a week, and beating him on street until he was bleeding and unconscious were motivated, at least in part, by protected grounds of race and imputed political opinion, as required for asylum, notwithstanding that soldiers were activated by fact that policeman had arrested high-ranking army officer for rape, where soldiers told policeman as they were beating him that Fiji was their country and that he “should go back to India.”

Nexus/Motive, Evidence Standard, Pre REAL ID, Fiji (2000); Motive Found, Pre REAL ID, Fiji (2000). “The evidence in this case is strikingly similar to the evidence we relied on in *Surita* and *Prasad*. In particular, the soldiers’ statement that Gafoor should ‘go back to India’ is nearly identical to the soldiers’ statement in *Surita* that she and her family should ‘go back home to India.’ Although the soldiers in *Surita* went one step further and said they were looting the house because her family was Indo-Fijian, that fact is insufficient to distinguish the two cases. The soldiers made clear to Gafoor that his race and imputed political opinion contributed to their hatred of him and provided them with additional motive for their actions. That they did not tell him specifically that they were motivated by these factors is unimportant. As noted

above, an applicant need not present direct evidence of a persecutor's motives if there is circumstantial evidence. See *Elias-Zacarias*, 502 U.S. at 483, 112 S.Ct. 812; *Chand v. INS*, 222 F.3d 1066, 1078 (9th Cir.2000). And the soldiers' statements to Gafoor are unmistakable circumstantial evidence that they were motivated by his race and imputed political opinion. See *Yazitchian v. INS*, 207 F.3d 1164, 1167-68 (9th Cir.2000) (evidence that government agents accused petitioner of providing weapons to opposition party, called him a 'Dashnak,' and told him to leave Armenia compelled conclusion that he was persecuted on account of an imputed political opinion)." (at 651-52).

- ✱ *Tagaga v. INS*, 228 F.3d 1030 (9th Cir. 2000) (b) (6); reversing and remanding based on finding that ethnic Fijian who had supported political party dominated by ethnic Indians had established eligibility for withholding by offering evidence that, *inter alia*, military officials had stated he would face trial for treason were he to return to Fiji; REINHARDT.

Well-Founded Fear/Fiji, Objectively Reasonable, Found, Fiji (2000); Ethnicity/Not Affirmed, Fiji (2000). Fijian asylum applicant established well-founded fear of future persecution required for asylum eligibility, as well as higher burden required for withholding of deportation, by offering evidence that he had supported political party dominated by ethnic Indians even though he was ethnic Fijian, that while serving as military officer he had served six-month sentence for refusing to arrest Indo-Fijians, and that military officials had stated specifically that he would face trial for treason and that his life and freedom would be placed in danger were he to return to Fiji.

- ✱ *Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000) (b) (6); remanding based on findings that (1) harm suffered by Hindu Indian, who had been physically attacked by soldiers from Fijian military on three occasions, had been told after being robbed repeatedly that police were not interested in dealing with problem, and was forced to flee after his house and furniture were taken from him, rose to level of persecution; (2) persecution was based on his status as member of minority population of Indian Fijians; (3) no change of circumstances in Fiji sufficient to rebut presumption of future persecution was shown; and (4) alien established that it was more likely than not that he would be subject to persecution if he returned to Fiji; REINHARDT; *distinguished by Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000); *Gafoor v. INS*, 231 F.3d 645 (9th Cir. 2000); *Nagoulko v. INS*, 333 F.3d 1012 (9th Cir. 2003).

Persecution/Physical Harm, Not Affirmed, Fiji (2000); Robbery. Harm suffered by asylum applicant who had been victim of violence in his native Fiji on three occasions when he was physically attacked by soldiers from Fijian military, had been robbed repeatedly and testified that police were not interested in dealing with problem, and who was forced to flee after his house and furniture were taken from him and his wife, rose to level of "persecution" which could potentially establish his eligibility for asylum based on past persecution.

Persecution/Cumulative Effect, Fiji (2000). Where an asylum applicant suffered physical harm as result of government- sponsored attacks on more than one occasion, and was victimized at

different times over a period of years, the harm is severe enough that no reasonable fact-finder could conclude that it did not rise to the level of past persecution making applicant potentially eligible for asylum, particularly when incidents are considered along with other acts to which applicant was subjected.

Nexus/Motive Found, Pre REAL ID, Fiji (2000). At least one of attacks, and displacement from his home, were on account of applicant's race and religion, second attack occurred after applicant's father challenged discriminatory enforcement of laws, and Fijian authorities were sometimes unwilling or unable to control crimes committed by ethnic Fijians.

Past Persecution/Changed Conditions Not Found, Fiji (2000); Failure to Rebut, Fiji (2000). No showing was made that conditions in Fiji had changed sufficiently to rebut presumption of future persecution which arose after asylum applicant established that he had been subject to past persecution on basis of a protected ground in his native Fiji, and thus, applicant was eligible for asylum based on past persecution; while evidence indicated that, in general, conditions had improved after 1987 coups, they did not improve enough to protect applicant, who was a Hindu Indian, from several attacks by Fijian soldiers and ethnic Fijians, or from his eviction from his land and the seizure of his home, and racially motivated crime of type applicant faced remains a problem for some Indians in Fiji.

"It is not surprising that while racial or religious conditions may have improved generally, a number of individuals may continue to be subjected to acts of persecution on a regular basis. It may be true that in some regions of the country conditions are better than in others, or even that there are some villages in which persecution reigns and others in which it is entirely absent. Conditions may also differ depending on the social class or the political views of particular Indians. The State Department's Profile itself states that Indians are 'sometimes' subject to harassment and that police are 'sometimes' unable or unwilling to control it." (at 1079).

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- ✱ *Prasad v. INS*, 101 F.3d 614 (9th Cir. 1996) (amending and superseding 83 F.3d 315 on denial of reh'g) (A70-136-468); reversing and remanding based on findings that (1) Ethnic Indian petitioner was victim of past persecution on account of his political activity, and (2) he was entitled to benefit of presumption that he had a well-founded fear of future persecution that was un rebutted; THOMPSON; distinguished by *Singh v. INS*, 134 F.3d 962 (9th Cir. 1998).

Persecution/Detention, Not Affirmed, Fiji (1996); Physical Harm, Not Affirmed, Fiji (1996); Economic, Not Affirmed, Fiji (1996). Ethnic Indian established past persecution on account of his political activity, where he was jailed twice, beaten and subjected to sadistic and degrading treatment while in detention, beaten by agents of government on another occasion, and dismissed from his job because of his activities on behalf of ethnic Indians, all of which occurred in climate of official prejudice against ethnic Indians.

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- ✱ *Surita v. INS*, 95 F.3d 814 (9th Cir. 1996) ((b) (6)); remanding based on finding that ethnic Indian suffered past persecution by ethnic Fijians sufficient to trigger the presumption of a well-founded fear of future persecution; PREGERSON; distinguished by *Singh v. INS*, 134 F.3d 962 (9th Cir. 1998).

Persecution/Robbery; Economic, Not Affirmed, Fiji (1996); Ethnicity/Not Affirmed, Fiji (1996). Ethnic Indian suffered past persecution because of her race, triggering regulatory presumptions of eligibility; she was robbed 10-15 times on her way to and from work by ethnic Fijians because she was Indo-Fijian, she reported robberies to police, who said they could not do anything, she was compelled to quit her job of more than ten years and was afraid to leave her home, and ethnic Fijian soldiers looted her family's home because her family was of Indian descent, with the looting soldiers telling her family members that they should "go back home" to India.

- ✕ *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996) (b) (6); remanding based on findings that (1) applicant and his family were entitled to asylum based on past persecution; (2) lack of evidence that persecution was committed by organized or quasi-governmental group did not preclude asylum; and (3) threats to life and freedom of asylum applicant and his family triggered regulatory presumption that they are entitled to withholding of deportation; PREGERSON.

Persecution/Threats, Not Affirmed, Fiji (1996); Economic, Not Affirmed, Fiji (1996). Ethnic Indian was told that if he did not quit his job as the only Indo-Fijian general manager of a shipping company, he would be killed and his wife and daughter "finished off," and shortly thereafter, loaded cargo pallets were dropped nearly on top of him as he walked on the wharf, ethnic Fijians threatened him at knife point and threatened his wife and daughter with burning their house, and threats continued after he quit and moved to a nearby town.

Unable or Unwilling to Control/No Police Response. Lack of evidence that persecution was committed by organized or quasi-governmental group did not prevent applicant from establishing that he and his family were eligible for asylum; he reported each assault and threat to police, and, although he identified his assailants by name, police failed to respond to any of his crime reports, clearly indicating that police either could not or would not control ethnic Fijians who threatened applicant and his family.

France

Chronology

- ✖ *Siong v. INS*, 376 F.3d 1030 (9th Cir. 2004)
- ✓ *Vang v. INS*, 146 F.3d 1114 (9th Cir. 1998)
- ✓ *Yang v. INS*, 79 F.3d 932 (9th Cir. 1996)

✓ *Affirmed*

- ✓ *Vang v. INS*, 146 F.3d 1114 (9th Cir. 1998) ((b) (6)). See **Laos** (Laotian petitioner who feared persecution in Laos and not France had firmly resettled in France with his parents).
- ✓ *Yang v. INS*, 79 F.3d 932 (9th Cir. 1996) (cert denied, 519 U.S. 824 (1996)); regulation categorically precluding asylum for refugees who have firmly resettled in another country was not *ultra vires*; petition denied; HALL; distinguished by *Vang v. INS*, 146 F.3d 1114 (9th Cir. 1998); superseded by statute, accord *Kankamalage v. INS*, 335 F.3d 858 (9th Cir. 2003).

Bars to Asylum/Firm Resettlement, Found, France (1996). Laotian family who fled Laos in 1975 to Thailand and then to France as refugees for 14 years were firmly resettled in France, even though it was unclear whether they had ever applied or became eligible for permanent residence in France. 8 C.F.R. § 298.14(c)(2).

✖ *Not Affirmed*

- ✖ *Siong v. INS*, 376 F.3d 1030 (9th Cir. 2004) ((b) (6)); finding prejudice from ineffective assistance of counsel and remanding to the board to grant motion to reopen; TASHIMA.

Persecution/Threats, Not Affirmed, France (2004). Death threats and attacks in France on four friends of petitioner who, like him, served CIA in Laos qualifies as persecution based on his activity fighting the Laotian communists. (at 1039).

Bars to Asylum/Firm Resettlement, Not Found, France (2004). Although Laotian petitioner's residence in France was not "substantially and consciously restricted by the authority of the country of refuge," (8 C.F.R. § 208.15(b)) — he was in fact a citizen of France — nevertheless, the persecution he feared was from Laotian government agents conducting political violence against Hmong refugees living in France, and petitioner had thus not found a haven from persecution and could not be found to have firmly resettled in France. See *Yang v. INS*, 79 F.3d 932, 939 (9th Cir. 1996); *Ali v. Reno*, 237 F.3d 591, 595 (6th Cir. 2001). (at 1040).

Georgia

Chronology

- ✖ *Melkonian v. Ashcroft*, 320 F.3d 1061 (9th Cir. 2003)

- ✓ *Affirmed*

- ✖ *Not Affirmed*

- ✖ *Melkonian v. Ashcroft*, 320 F.3d 1061 (9th Cir. 2003) (b) (6); finding asylum eligibility based on documentary evidence of ethnic cleansing; Affirmed in part, reversed in part, and remanded; Alien's subjective fear of future persecution if he was returned to section of former Soviet Georgia from which he fled when Muslim separatists gained control of area was objectively reasonable, and made him eligible for grant of asylum, based on uncontradicted evidence in record that separatists were currently in control of area and had engaged in systematic campaign of ethnic cleansing to eliminate all non-Abkhaz, such as alien, and on evidence that separatists had specifically targeted alien before his departure—involving threats, harassment, stolen property, and a pattern of general violence—even without a claim of physical violence to the alien. The court was heavily influenced by documentary evidence. Furthermore, the IJ should not have denied asylum based solely upon finding alien could avoid persecution by relocating internally to another area of Georgia where he would be safe, without considering whether relocation was reasonable. W.FLETCHER.

Changed Country Conditions/Internal Relocation Not Possible, Georgia (2003); Changed Conditions Not Found, Georgia (2003). Once past persecution has been established, the burden of proof to defeat a claim based on internal relocation is upon the government because of the presumption that the threat exists nationwide. *See also Singh v. Ilchert*, 69 F.3d 375 (9th Cir. 1995). Fact that Muslim-controlled area of former Soviet Georgia from which alien fled became part of Georgia only in 1931, and had now reasserted its autonomy, so that any relocation by alien to other areas of Georgia would in fact be more akin to an international rather than to an internal relocation, was factor that IJ had to consider in deciding whether alien, who had otherwise established well-founded fear of future persecution, could nevertheless be denied asylum on ground that he could reasonably be expected to relocate internally.

Bars to Asylum/Firm Resettlement, Not Found, Georgia (2003). Refugee need not seek asylum in first place where he arrives, and mere fact that Armenian refugee from former Soviet Georgia, prior to arriving in the United States, had stayed for several weeks in Russia did not render him ineligible for asylum.

Germany

Chronology

- ✓ *Nahravani v. Gonzales*, 399 F.3d 1148 (9th Cir. 2005)
- ✗ *Mashiri v. Ashcroft*, 383 F.3d 1112 (9th Cir. 2004)

✓ *Affirmed*

- ✓ *Nahravani v. Gonzales*, 399 F.3d 1148 (9th Cir. 2005) (b) (6); upholding IJ's denial of asylum based on finding that alien had firmly resettled in Germany; Alien experienced clear persecution in Iran which prompted his flight therefrom and a grant of asylum in Germany; he asserted that after he formally went to the Iranian embassy to renounce his citizenship he became a target of the Iranian government's persecution all over again. Alien provided an expert's opinion as to the objective component of the claim having been met; notwithstanding "death threats" being made against him, the majority found such threats "were anonymous, vague, and did not create a sense of immediate physical violence," (at 1153), and "too vague to constitute persecution." (at 1157); RAWLINSON; (B.FLETCHER, dissenting, found that the Iranian government recommenced a campaign of persecution against alien and the German government was unwilling or unable to control).

Bars to Asylum/Firm Resettlement, Found, Germany (2005). Alien's deep and significant ties to Germany during his 10-year residence in the country, after he fled from Iran, amounted to firm resettlement; alien was granted permanent residency in Germany and renounced his Iranian citizenship in an attempt to gain German citizenship, he married a German citizen, worked, and traveled freely throughout the country, and practiced Christianity openly.

Persecution/Harassment, Germany (2005); Threats, Affirmed, Germany (2005); Property Damage, Germany (2005). Although alien described several incidents in Germany of harassment, escalating threats—including those of death,—and property damage, he suffered only *de minimis* property damage and anonymous, ambiguous threats that did not create a sense of immediate physical violence, he suffered no physical harm, and he was never detained. This was so, notwithstanding an expert's supportive report.

Unable or Unwilling to Control/Police Response. German police took reports documenting alien's various complaints, alien admitted that he did not give police names of any suspects because he did not know any specific names, and alien's wife testified that police investigated complaints, but were ultimately unable to solve crimes.

✗ *Not Affirmed*

✱ *Mashiri v. Ashcroft*, 383 F.3d 1112 (9th Cir. 2004) (b) (6)); remanding based on finding that German officials were unwilling or unable to control anti-foreigner violence against native Afghan living in Germany; B.FLETCHER.

Persecution/Threats, Not Affirmed, Germany (2004); Property Damage, Germany (2004); Emotional. A note left on petitioners' car "invoked the terror of Germany's Nazi past and threatened death if the family did not leave Germany," and was followed by violent ransacking of their apartment one month later, and then by sightings of anti-foreigner mobs in the area, all of which is "strong evidence of persecution." Past persecution can be established by infliction of emotional or psychological trauma, as well as physical acts. (at 1119–20).

Persecution/Cumulative Effect, Germany (2004). Petitioner's evidence of a death threat, violent physical attacks against her husband and sons, a near-confrontation with a violent mob, vandalism, economic harm and emotional trauma compels a finding of past persecution. (at 1121).

Unable or Unwilling to Control/No Police Response. Police's limited investigation of anti-foreigner motivated attacks, combined with statements to petitioners that foreigners "better try to take care of [themselves]," demonstrated the government was unwilling to control anti-foreigner violence. (at 1121).

Unable or Unwilling to Control/Nationwide Basis. An asylum applicant who has demonstrated past persecution is not required to prove that the government was unable or unwilling to control the violence on a countrywide basis, and need only show that the government was unable or unwilling to control the persecution in the applicant's home city or area. (at 1122).

Changed Country Conditions/Internal Relocation Not Possible, Germany (2004); Individualized Analysis, Germany (2004); Changed Conditions Not Found, Germany (2004). State Department Report's general observations and descriptions of Germany as a functioning democracy do not rebut applicant's testimony of violence in other areas, the difficulty of relocating, or the existence of family ties in the United States. (at 1123).

Ghana

Chronology

✖ *Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010)

✓ *Affirmed*

✖ *Not Affirmed*

✖ *Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010) (b) (6); reversing and remanding a claim of persecution by private parties that the government is unable or unwilling to control. Respondent was “persecuted by Muslims because he proselytized as a Baptist preacher in predominately Muslim areas.” He was badly beaten and sought police assistance without benefit. Credibility was not at issue. The Board denied his claim, finding that he could live elsewhere in Ghana. The Board also found that “the evidence establishe[d] the Government of Ghana would attempt to protect Afriye from persecution,” primarily based on a State Department country report which states that “Christians live throughout Ghana, making up 69% of the population” and “the majority of Muslims are concentrated” in certain sections. Further, a “guidance document from the British Home Office states that there was “no evidence that Christians and converts to Christianity are not able to seek and receive adequate protection from state authorities.” The claim was also denied because “(1) Afriyie never reported most of the incidents to the police” . . . (2) Afriye was not able to identify his attackers or precisely where he was attacked, and so he could not explain how he expected the police to protect him, and (3) Afriye was ‘under the impression’ the police would investigate the assault.” BERZON.

Unable or Unwilling to Control/Reporting Not Required, Not Affirmed, Ghana (2010). “Reporting persecution to government authorities is not essential to demonstrating that the government is unable or unwilling to protect him from private actors.” The circuit makes it clear that the essential inquiry of adequate protection is not whether the incident was reported, but rather whether the alien “was able to do so.” The circuit found clear error in the administrative conclusion that the alien was able to do so based on “general statements,” citing *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9th Cir. 2004).

Past Persecution/Internal Relocation Not Possible, Ghana (2010). “There are two steps to the relocation analysis, the first focusing on ‘whether an applicant can relocate safely’ and the second asking ‘whether it would be reasonable to require the applicant to do so.’” The circuit rejected the administrative analysis, citing *Kaiser v. Ashcroft*, 390 F.3d 653, 659 (9th Cir. 2004); *Boer-Sandano v. Gonzales*, 418 F.3d 1082, 1090 (9th Cir. 2005); 8 C.F.R. § 1208.13(b)(3).

CAT/Acquiescence, Not Affirmed, Ghana (2010). The circuit also remanded the denial of the CAT claim because there was sufficient evidence “that the government of Ghana was aware of the danger Afriyie was facing, yet unwilling to protect him.”

Guatemala

Chronology

- ✖ *Perez-Guzman v. Lynch*, 835 F.3d 1066, (9th Cir. 2016)
- ✓ *Andrade-Garcia v. Lynch*, 828 F.3d 829, (9th Cir. 2016)
- ✖ *Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015)
- ✖ *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014)
- ✓ *Garcia-Milian v. Holder*, 755 F.3d 1026 (9th Cir. 2014)
- ✓ *United States v. Reyes-Bonilla*, 671 F.3d 1036 (9th Cir. 2012)
- ✖ *Mendoza-Pablo v. Holder*, 667 F.3d 1308 (9th Cir. 2012)
- ✖ *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010)
- ✓ *Lopez-Almaraz v. Holder*, 608 F.3d 638 (9th Cir. 2010)
- ✓ *Toj-Culpatan v. Holder*, 612 F.3d 1088 (9th Cir. 2010)
- ✓ *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009)
- ✓ *Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009)
- ✖ *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007)
- ✖ *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007)
- ✖ *Recinos de Leon v. Gonzales*, 400 F.3d 1185 (9th Cir. 2005)
- ✖ *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814 (9th Cir. 2004)
- ✖ *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004)
- ✖ *Lopez v. Ashcroft*, 366 F.3d 799 (9th Cir. 2004)
- ✓ *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995 (9th Cir. 2003)
- ✓ *Alvarez Santos v. INS*, 332 F.3d 1245 (9th Cir. 2003)
- ✓ *Antonio-Martinez v. INS*, 317 F.3d 1089 (9th Cir. 2003)
- ✖ *Ventura v. INS*, 317 F.3d 1003 (9th Cir. 2003)
- ✖ *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002)
- ✖ *Ruano v. Ashcroft*, 301 F.3d 1155 (9th Cir. 2002)
- ✖ *Rios v. Ashcroft*, 287 F.3d 895 (9th Cir. 2002)
- ✓ *Molina-Estrada v. INS*, 293 F.3d 1089 (9th Cir. 2002)
- ✓ *Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000)
- ✖ *Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000)
- ✖ *Chanchavac v. INS*, 207 F.3d 584 (9th Cir. 2000)
- ✖ *Escobar-Grijalva v. INS*, 206 F.3d 1331 (9th Cir. 2000)
- ✖ *Jacinto v. INS*, 208 F.3d 725 (9th Cir. 2000)
- ✓ *Tecun-Florian v. INS*, 207 F.3d 1107 (9th Cir. 2000)
- ✖ *Cordon-Garcia v. INS*, 204 F.3d 985 (9th Cir. 2000)
- ✓ *Sebastian-Sebastian v. INS*, 195 F.3d 504 (9th Cir. 1999)
- ✓ *Ortiz v. INS*, 179 F.3d 1148 (9th Cir. 1999)
- ✖ *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999)
- ✖ *Ordenez v. INS*, 137 F.3d 1120 (9th Cir. 1998)

✓ Affirmed

- ✓ *Andrade-Garcia v. Lynch*, 828 F.3d 829, (9th Cir. 2016) (b) (6); in an amended decision, affirming the IJ's determination that the alien was not entitled to relief under CAT. After being issued a notice of intent to reinstate a prior removal order, the alien expressed a fear of return and his case was referred to an asylum officer. *Id.* at *3. "The asylum officer determined that Andrade-Garcia failed to demonstrate either a reasonable fear of future persecution or a reasonable fear of torture," and, on appeal, the IJ agreed. *Id.* IKUTA.

CAT/Reinstated Removal Order Standard, Guatemala (2016). An alien who is subject to a reinstated removal order is generally barred from relief. *Id.* at *2 (citing INA § 241(a)(5)). However, "if an alien 'expresses a fear of returning to the country designated' in the reinstated order of removal, the alien must be 'immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture.'" *Id.* at *3 (quoting 8 C.F.R. § 241.8(e)). If the asylum officer determines that the alien has demonstrated a reasonable fear of future persecution on account of a protected ground, or a reasonable fear of torture, then the officer must refer the case to an IJ. *Id.* (citing 8 C.F.R. § 208.31(c), (e); 8 C.F.R. § 1208.31(c), (e)). Alternatively, the alien can appeal an asylum officer's negative determination. *Id.* The Ninth Circuit can "review 'constitutional claims or questions of law' that are 'raised in the context of reinstated removal orders.'" *Id.* at *4 (quoting *Garcia de Rincon v. Dep't of Homeland Sec.*, 539 F.3d 1133, 1137 (9th Cir. 2008)). The Ninth Circuit treats reinstated orders as final orders of removal, and, consequently, applies the same standard of review to both. *Id.* at *6. Specifically, in the context of reinstated removal orders, the Ninth Circuit reviews the IJ's factual findings underlying the denial of relief under the "substantial evidence" standard. *Id.* at *4.

- ✓ *Garcia-Milian v. Holder*, 755 F.3d 1026 (9th Cir. 2014); upholding a denial of relief. Respondent had asserted a political opinion claim, which had been denied due to a failure to demonstrate the requisite "nexus" to a protected criterion. Credibility was not at issue. The was not a REAL ID Act case, so the holding of the case carries further significance for REAL ID cases. Respondent had an intimate relationship with a Noe Garcia. Respondent felt that she had been followed "twenty times" by "masked men." 755 F.3d at 1030. Shortly before leaving Guatemala, she had been approached by "the two masked men" who demanded of her to know the whereabouts of Mr. Garcia, whom she had broken up with a number of years earlier. She was then raped and badly beaten by them. Respondent presented considerable documentation, which "indicate[d] *Guatemalan police had minimal training or capacity for investigating or assisting victims of sexual crimes, and that the Guatemalan government had been ineffective in investigating violence against women and homicides.*" *Id.* IKUTA. Dissent by PAEZ.

Political Opinion/Imputed, Not Found, Guatemala (2014). The court noted that “[t]he masked men did not make any statements attributing political views to Garcia-Milian or indicating that they were retaliating against her due to the views of” Mr. Garcia. *Id.* at 1032. The court held that “[t]his single statement . . . looking for Mr. Garcia because he had been in a guerrilla group . . . does not establish whether the men imputed a political opinion to Garcia-Milian or merely wanted to extract information from her about Noe Garcia’s whereabouts.” *Id.* at 1033.

CAT/Acquiescence, Affirmed, Guatemala (2014). “A government does not acquiesce in the torture of its citizens because it is aware of torture but powerless to stop it.” *Id.* at 1034 (citing *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007)). “There must be evidence that the police are unable or unwilling to oppose the crime. Otherwise, ‘a person could obtain CAT relief merely because he was attacked by a gang of neighborhood thugs whom the police were unable to apprehend.’” *Id.* (quoting *Reyes-Sanchez v. Att’y Gen.*, 369 F.3d 1239, 1242 (11th Cir. 2004)). “Nor does evidence that a government has been generally ineffective in preventing or investigating criminal activities raise an inference that public officials are likely to acquiesce in torture, absent evidence of corruption or other inability to oppose criminal organizations. In *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 346 (5th Cir. 2006) for example, the court rejected the petitioner’s claim that the Colombian government acquiesced in attacks by a narco-terrorist organization, even though the police informed the petitioner that it lacked the resources to protect individual families, and the record contained significant evidence that the Colombian government was unable to prevent the terrorist group’s crimes.” *Id.* Similarly in *Menjivar v. Gonzales*, 416 F.3d 918, 922-23 (8th Cir. 2005), the court rejected a petitioner’s claim for CAT relief despite her evidence that she had been attacked by a gang member and the record included newspaper articles detailing the government’s difficulty in controlling gangs.” 755 F.3d at 1035. “By contrast, evidence that police officials were corrupt, and worked on behalf of criminals or gangsters, may establish that the government had acquiesced in criminal activities.” *Madrigal v. Holder*, 716 F.3d 499, 510 (9th Cir. 2013).

CAT/Acquiescence, Women, Guatemala (2014). While recognizing that Guatemala has taken steps to try to protect women, “these steps have not achieved the desired goals of resolving crimes and protecting citizens, they support the BIA’s determination that the government is not willfully blind to attacks on women in Guatemala.” 755 F.3d at 1035.

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- ✓ ***United States v. Reyes-Bonilla*, 671 F.3d 1036 (9th Cir. 2012);** upholding a conviction for criminal re-entry. Respondent was an aggravated felon. He claimed no ability to speak, read, or write English. He had been ordered removed and returned with inspection. The court concludes: “Reyes did not waive his right to counsel and was denied his due process right to counsel because he was not properly advised of his rights in a language that he could understand . . . this violation of his right to counsel was not inherently prejudicial . . . because Reyes cannot demonstrate that he had a plausible claim to relief.” (at 1052). The relief was under CAT. This claim would have been based on “people who return from the United States are frequently targeted by gangs because the gangs believe that they have money . . . members of the gang MS-13 beat me and tried to kill me in Guatemala.” (at 1042). GOODWIN

CAT/More Likely Than Not, Not Found, Guatemala (2012). The court found the claim not to be plausible because he did not indicate any evidence of persecution prior to removal nor

evidence of any “widespread human rights violations” that existed prior to the order of removal. (at 1051). *Dhital v. Mukasey*, 532 F.3d 1044, 1051 (9th Cir. 2008) (“The petitioner must demonstrate that he would be subject to a ‘particularized threat of torture.’”).

- ✓ ***Lopez-Almaraz v. Holder*, 608 F.3d 638 (9th Cir. 2010) ((b) (6))**; upholding a denial of a motion to reopen. Respondent sought to have his case reopened three years after the Board dismissed the appeal in his case in order to request asylum “based on new evidence.” Although respondent had been diagnosed with AIDS in 2001 “several years before his immigration hearing,” he had not brought up the issue because “he thought it would frustrate his efforts to remain in the U.S. [because] in Guatemala people with HIV are stigmatized and live in constant fear of retaliation.” McKEOWN.

Motion to Reopen/Changed Circumstances, Personal, Affirmed, Guatemala (2010). “Although Lopez’s fear to reveal his diagnosis is understandable, it does not render the old information suddenly new.” Furthermore, “a change in Lopez’s health is a change in his personal circumstances, not a change in circumstances ‘arising in a country of nationality’ . . . Lopez’s argument that a change in personal circumstances might satisfy the requirements to file an untimely asylum application . . . is foreclosed by the BIA’s decision in *Matter of C-W-L*.” The circuit then cites *Chen v. Mukasey*, 524 F.3d 1028, 1032 (9th Cir. 2008) as accepting this proposition. The circuit concluded, “thus, even if a change in personal circumstances is sufficient to file a successive asylum petition . . . a change in country conditions must still be demonstrated if the accompanying motion to reopen is untimely.” The circuit rejected as insufficient the additional argument that the recent enactment of an international trade pact which purportedly makes HIV drugs more expensive and difficult to obtain.

- ✓ ***Toj-Culpatan v. Holder*, 612 F.3d 1088 (9th Cir. 2010) (pet for reh. denied, amended opinion issued) ((b) (6))**; affirming the denial of relief because the I-589 had not been timely filed. The only issue decided in the holding involved the timing of the filing. Respondent came to the U.S. in February 1998. He was then detained and asserted a fear of returning to Guatemala. Respondent was told to submit the application at his hearing on April 16, 1998. At that time, respondent was represented by counsel. The offered I-589 was rejected because it had not been filled out in English. The hearing was continued until May. “Counsel specifically told petitioner that if petitioner sent counsel the application in Spanish, counsel would have it translated into English for him.” Respondent was then released and venue over his case transferred. Petitioner finally filed his asylum application in English at his first hearing in the new venue of on September 7, 1999, approximately 17 months after the one year deadline of February 1999. There was no claim of ineffective assistance of counsel. PER CURIAM.

Bars to Asylum/One Year Bar, Found, Guatemala (2010); Bars to Asylum/One Year Bar, Age of Majority (2010). Under 8 C.F.R. § 208.4(a)(5), the bar can be waived on demonstration of “extraordinary circumstances.” Respondent argued that the following circumstances were extraordinary: (1) he does not speak English; (2) he was detained for two months in an immigration detention center; and (3) his case was transferred after he moved from Arizona to

California. The circuit held that “none of these circumstances, either alone or in combination, constitute ‘extraordinary circumstances’ justifying the untimely filing.”²⁵

Bars to Asylum/Extraordinary Circumstances, English Non-Fluency. The court was unimpressed with Respondent’s non-fluency in English: “The inability to speak English constitutes an ordinary, not extraordinary, circumstance for immigrants.”²⁶

Bars to Asylum/Extraordinary Circumstances, Delay in Docketing. The circuit did not find the delay in docketing to be a justifiable basis for Respondent’s delay in filing: “He did not need to wait for a hearing to file his application.”

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- ✓ *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009) (b) (6); affirming a denial of relief. The respondent had also sought NACARA. His asylum claim was based on threats from gang members who “started to steal things from him . . . they cut his neck with a switchblade [and] told him it was a sign of what could happen to him” if he did not do their bidding. Since coming to the U.S. he had been advised that gang members had visited his residence “asking about and threatening him.” Credibility was not at issue. WARDLAW

Particular Social Group /Gangs, Not Found, Guatemala (2009). The Court cited in particular to *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009), for the rejection of “young men in Guatemala who resist gang recruitment constitute a social group” as a particular social group. The Court also found that respondent was not justified in his political opinion claim where “being victimized [was due to] economic and personal problems,” citing *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008).

Derivative Claims/NACARA. The Court rejected respondent’s NACARA claim by holding that “a minor who seeks relief as a derivative must personally satisfy the Act’s requirement of seven years of continuous physical presence. Ramos’s father’s physical presence in the U.S. cannot be imputed to him to satisfy this requirement.”

²⁵ On June 22, 2010, the Board issued an unpublished three member panel decision finding an asylum application to be untimely from a 21-year old. The Board held that “21 is [not] the age of majority” in terms of applying the one year bar as set forth in Section 208(a)(2)(D) of the INA. The Board explained: “Although the term ‘minor’ is not defined in the Act, some provisions of the Act reflect that a minor is anyone under the age of 18 years. See section 212(a)(9)(B)(iii)(i). The term ‘minor’ is not synonymous with the term ‘child’ under the Act. Section 101(b)(1).” *Matter of Martinez*, A99-954-072.

²⁶ There is a presumption of knowledge of the law. *Cheek v. United States*, 498 U.S. 192, 199 (1991); *Yamataya v. Fisher*, 189 U.S. 86, 101-102 (1903) (“it is true that she pleads a want of knowledge of our language; that she did not understand the nature and import of the questions propounded to her These considerations cannot justify the intervention of the courts”). Notwithstanding the claimed lack of understanding of the forms executed in *Martinez-Merino v. Mukasey*, 525 F.3d 801 (9th Cir. 2008) (turning aside a challenge to an order of reinstatement regarding an alien a lack of understanding of what he had previously signed), the challenge was rejected. *Garcia de Rincon v. DHS*, 539 F.3d 1133 (9th Cir. 2008). The court denied relief despite its acceptance of her assertion that she “did not understand . . . I was frightened and confused” regarding the immigration papers that she had previously signed, now being used against her.

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- ✓ *Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009) (b) (6)); affirming a denial of relief on credibility grounds. The respondent first put forth a claim based on asserted political activism. Relief was denied for lack of credibility. The Ninth Circuit found the basis of the administrative reasoning to be insufficient and remanded the case in an unpublished decision. The claim dramatically changed to the respondent being gay and consequently having had adverse experiences. The court extensively quotes from and relied on the Asylum Adjudicator's assessment to refer which had found the respondent to be credible on the first and then withdrawn claim of having been a political activist. TROTT; Dissent by PREGERSON.

Credibility/Oath. "The major check on the asylum seeker's incentive to lie is an oath to tell the truth, and the asylum seeker's belief that he or she will be held to that oath. It is fair to say that the asylum process is ultimately an honor system - it depends largely on the assumption that asylum seekers will take the oath seriously, and that they will be truthful in their testimony.

Credibility/Inconsistencies, Attempt to Enhance Claim. The dissent emphasized that at the time of the application, "the INS had not yet recognized that persecution on account of sexual orientation provided a valid basis for an asylum claim" and that he amended his claim shortly thereafter.

- ✓ *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995 (9th Cir. 2003) (b) (6)); upholding BIA's finding that INS rebutted presumption of well-founded fear; Use of a Department of State Country Report was upheld in denial of relief to demonstrate that because of changed conditions, applicant no longer had an objectively reasonable fear. "The fact that Gonzalez relocated to Guatemala city without receiving any threats is highly relevant," even though he reported that individuals continued to look for him in his home village. This deference to the Department of State report was upheld, even though the report was characterized as "contradictory or ambiguous." (at 999); petition denied; TALLMAN.

Past Persecution/Country Reports, Use Of Permitted, Guatemala (2003). "[W]here the BIA rationally construes an ambiguous or somewhat contradictory country report and provides an "individualized analysis of how changed conditions will affect the specific petitioner's situation," *Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1999) (en banc) (citation and internal quotation marks omitted), substantial evidence will support the agency determination." (at 1000).

- ✓ *Alvarez-Santos v. INS*, 332 F.3d 1245 (9th Cir. 2003) (b) (6)); affirming BIA denial of asylum upon finding that alien failed to show he had a well-founded fear of persecution if returned to Guatemala; BERZON.

Credibility - Pre-REAL ID/Omissions, Affirmed, Guatemala (2003). Standing alone, omissions from asylum applications are not a sufficient basis for discrediting later testimony, especially when the applications were prepared by someone else. (at 1254).

Credibility - Pre-REAL ID/Implausibility, Affirmed, Guatemala (2003). "Here, however, there were additional compelling reasons for discrediting [applicant]'s testimony concerning a

dramatic, pivotal event that had been omitted from his asylum applications. It is simply not believable that an applicant for asylum would fail to remember, and thus to include in either of his two asylum applications *or* his principal testimony, a dramatic incident in which he was attacked, stabbed, and fled to the mountains—the very incident that precipitated his flight from Guatemala—only to be reminded of it at the conclusion of his testimony, after taking a break, and, assertedly, because of an itch in his shoulder.” (at 1254).

- ✓ *Antonio-Martinez v. INS*, 317 F.3d 1089 (9th Cir. 2003) ((b) (6)); dismissing petition to review denial of asylum under fugitive disentitlement doctrine, where alien had been missing for over two years; KOZINSKI.
- ✓ *Molina-Estrada v. INS*, 293 F.3d 1089 (9th Cir. 2002) (*amending and superceding* 281 F.3d 906 (9th Cir. 2002)) ((b) (6)); dismissing in part and denying in part; (1) Court of Appeals lacked jurisdiction to review BIA determination that no extraordinary circumstances excused alien’s untimely filing of his application for asylum, and to review BIA discretionary denial of alien’s application for cancellation of removal; (2) alien was ineligible for cancellation of removal on ground that his removal would cause exceptional hardship to his mother; and (3) evidence supported findings that alien was ineligible for withholding of removal; GRABER.

Political Opinion/Imputed, Not Found, Guatemala (2002). Evidence of military position of alien’s father in Guatemala and that, in 1982, when alien was 13 years old, he was injured and his father and cousin were killed when guerillas bombed his family’s house in Guatemala, was insufficient to prove that he was targeted for persecution on account of an imputed political opinion of his father’s, as would support his application for withholding of removal, absent any evidence that his father held particular political beliefs.

Particular Social Group/Family, Affirmed, Guatemala (2002). Assuming that alien’s family was a “particular social group” within the meaning of statute setting forth persecution on account of membership in a particular social group as a ground for withholding of removal, evidence in removal proceeding supported finding that alien, a citizen of Guatemala, was not persecuted in Guatemala on account of his family membership; although evidence showed he was a victim of violence directed against his father when, in 1982, when alien was 13 years old, he was injured and his father and cousin were killed when guerillas bombed his family’s house in Guatemala, there was no compelling evidence that alien was an intended victim.

Past Persecution/Changed Conditions Found, Guatemala (2002); Country Reports, Use Of Permitted, Guatemala (2002). Evidence in removal proceeding supported finding that alien, a citizen of Guatemala, failed to demonstrate a reasonable fear of future persecution as would support his application for withholding of removal; alien did not establish past persecution, so there was no presumption to overcome, State Department report on country conditions showed that Guatemala’s civil conflict ended in 1996, that the guerillas whom alien contended posed a future threat were being successfully reintegrated into productive society, and that there was a marked improvement in the human rights situation, and alien failed to present credible, direct, and specific countervailing evidence in support of his fear of future persecution.

Nexus/Motive Not Found, Pre REAL ID, Guatemala (2002). “Although Petitioner was injured in the bombing of his family’s house, there is no compelling evidence that the attackers knew that his father had a son or that they knew Petitioner was in the house at the time of the attack. That is, although he was a victim of the violence directed against his father, there is no compelling evidence that he was an intended victim. Petitioner did testify that threatening telephone calls were made to his grandmother’s and sister’s houses after the attack, but he did not testify about the specific content of the calls or the nature of the threats. There is no evidence that the guerillas ever threatened him.” (at 1095).

- ✓ ***Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000)** (b) (6); denying petition based on finding that alien’s kidnappings, first by government soldiers and then by guerillas, in effort to force him to join their respective military operations, was not on account of protected characteristic, and thus did not warrant asylum eligibility; WALLACE; (PREGERSON, concurring, argued that the panel had overreached in suggesting that Mayan Indians of Guatemala did not comprise a social group, and that the ruling should not foreclose relief to another asylum applicant relying on the same theory but making a different evidentiary showing).

Nexus/Motive Not Found, Pre REAL ID, Guatemala (2000). Kidnaping of Kanjobal Indian in Guatemala, first by government soldiers and then by guerillas, in effort to force him to join their respective military operations, was not on account of his race, membership in a particular group, or political opinion, and thus did not warrant asylum eligibility; documentary evidence indicated that civilians were forcibly recruited by both sides in areas of conflict, not that Kanjobal Indians were recruited because of any protected ground, and indigenous people comprising large percentage of population in disputed area did not constitute social group.

Persecution/Forced Conscription, Forced Conscription (2000). Absent evidence of discriminatory purpose, a guerilla organization’s attempts to force a person to join them is insufficient to compel a finding of persecution on account of political belief warranting eligibility for asylum.

- ✓ ***Tecun-Florian v. INS*, 207 F.3d 1107 (9th Cir. 2000)**; denying petition upon finding alien did not have a fear of persecution on account of religious beliefs, political opinion, or imputed political opinion; REAVLEY; (FERGUSON, dissenting, argued that the holding in *Elias-Zacarias* was not as broad as interpreted by the majority, arguing that it does not stand for the general proposition that persecution following a refusal to assist can never constitute a basis for seeking asylum).

Nexus/Motive Not Found, Pre REAL ID, Guatemala (2000). BIA reasonably determined that alien who refused to join Guatemalan guerillas because of his religious beliefs and was tortured by them for ten days did not have fear of persecution on account of religious beliefs, political opinion, or imputed political opinion, and thus was not eligible for asylum; although guerillas watched him going to church, he never told them his refusal was based on religious beliefs, he and his sister testified that torture was result of his refusal to join, and neither alien nor sister testified that his brothers’ government service motivated guerillas to torture him.

Nexus/Retribution, Not On Account of Protected Ground, Guatemala (2000). “Although the record demonstrates that Tecun-Florian refused to join the guerillas because the guerillas’ actions violated his religious beliefs, the BIA could reasonably determine that the guerillas tortured Tecun-Florian solely in retribution for refusing to join their group--and not because of his religious or political beliefs. Tecun-Florian testified that the guerrillas told him that they were persecuting him because he refused to join them, and he himself believed that the guerillas acted out of retribution for his refusal to join. Tecun-Florian’s sister also testified that she believed the guerillas kidnaped her brother because he refused to enlist with them. The only evidence suggesting that the guerillas were motivated by anything other than his refusal to join them was the fact that they watched him going into the church. Bound by the authority of *Elias-Zacarias*, we must hold that the evidence presented was not ‘so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.’” (at 1109).

- ✓ ***Sebastian-Sebastian v. INS*, 195 F.3d 504 (9th Cir. 1999)** (b) (6); denying petition based on deference to BIA’s implied adverse credibility finding; WIGGINS; (WIGGINS, concurring, and BRUNETTI, specially concurring: BIA made implied finding that alien’s testimony was not credible when it found that alien’s persecution by Guatemalan guerillas was not due to implied political opinion based on his brother’s military service, and, thus, Court of Appeals was required to defer to such decision and deny asylum); (PREGERSON, dissenting, found that the alien had established a well-founded fear of future persecution on account of imputed political opinion, and that neither the INS, IJ, or BIA had questioned his credibility).
 - ✓ ***Ortiz v. INS*, 179 F.3d 1148 (9th Cir. 1999)** (b) (6); petition denied; (1) unexhausted administrative remedies precluded remand to BIA so they could apply for suspension of deportation under NACARA and CAT; (2) aliens were not prejudiced as result of any ineffective assistance of counsel and thus were not denied due process; (3) alien’s admission supported factual finding that he had been convicted of drug trafficking; (4) BIA’s dismissal of appeal of denial of asylum was action triggering application of definition of aggravated felony found in IIRIRA; and (5) alien’s Guatemala conviction for drug trafficking was aggravated felony; BOOCHEVER.
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Asylum Application/Ability to Amend. Alien’s original asylum application had been prepared by a notary; IJ granted his new counsel opportunity to amend, since counsel had indicated some of it was untrue. Alien testified that his life would be threatened if returned because police had come to his house and beaten him on several occasions.

Administrative Proceedings/Exhausting Admin Remedy. Aliens appealing denial of asylum were not entitled to remand to Board of Immigration of Appeals so they could apply for relief under CAT, inasmuch as they had unexhausted administrative remedy in form of motion to BIA to reopen their deportation proceedings.

Ineffective Assistance/Prejudice Not Found. Aliens were not prejudiced by, and thus were not denied due process as result of, any ineffective assistance of counsel provided them in deportation proceedings; although aliens sought remand so they could explain why they were

eligible for asylum, they failed to explain what evidence they would present on remand to support their claim.

× *Not Affirmed*

- × *Perez-Guzman v. Lynch*, 835 F.3d 1066, (9th Cir. 2016) (b) (6); granting in part and denying in part a petition for review and remanding for the BIA to consider Perez's applications for withholding of removal under the Act and CAT. *Id.* at *12. The alien entered the United States without inspection and was removed after expedited removal proceedings. *Id.* at *1. He reentered in 2012 and the DHS reinstated the prior removal order. *Id.* After an asylum officer found the alien had established a reasonable fear of torture, he was referred to an IJ who declined to consider the asylum application on the basis of the reinstated order and denied withholding under the Act and CAT on the merits. *Id.* The Board affirmed. *Id.* The Circuit found that the applicant was barred from seeking asylum on the basis of his reinstated removal order. *Id.* at *12. However, it remanded his claims for withholding of removal under the Act and CAT due to intervening case law: *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (en banc) (holding that witnesses who testify against gang members may constitute a particular social group) and *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013) (stating that local officials' acquiescence in an applicant's torture is sufficient to entitle him to CAT relief, even if the national government did not acquiesce in this mistreatment). *Id.* FISHER.

Removal Order/Reinstatement Of. Applying step one of *Chevron*, the Circuit held that "Congress has not clearly expressed whether [INA § 241(a)(5)] . . . prevents an individual subject to a reinstated removal order from applying for asylum under [INA § 208]." *Id.* Indeed, the two sections "are in apparent conflict . . . [the latter] broadly grants 'any alien' the opportunity to seek asylum, 'regardless of such alien's status,' subject only to a few exceptions not applicable here. [INA § 241(a)(5)], by contrast, expressly bars aliens subject to reinstated removal orders from applying for any relief under . . . the chapter that includes asylum." *Id.* at *5. Applying step two of *Chevron*, the Circuit found that the Attorney General's regulation ("8 C.F.R. §1208.31(e), which prevents individuals subject to reinstated removal orders from applying for asylum but permits them to seek withholding of removal") is a reasonable interpretation of both sections. *Id.* at *9. The Circuit found that it was reasonable to conclude that INA § 241(a)(5) is more specific than INA § 208, and invoke the canon of construction that the specific governs the general. *Id.* at *6, *9. The Circuit also found the regulation to be "consistent with Congress' intent in IIRIRA that the reinstatement of a previous removal order would cut off certain avenues for relief from removal." *Id.* at *10. Further, the DHS "has discretion to forgo reinstatement and instead place an individual in ordinary removal proceedings," which would not be impacted by the INA § 241(a)(5) bar. *Id.* at *11 (citation omitted). The Circuit noted that due to the specific issues in this case, it did not need to address a hypothetical scenario where "circumstances [had] materially changed between [an alien's]

removal from the United States and his subsequent reentry,” where “th[e]se two provisions [would] actually [be] in conflict.” *Id.* at *11 n.10.

- ✱ ***Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015)** (b) (6); granting in part and denying in part a petition for review with regard to a withholding claim. Gang members killed the applicant’s father and cousin and threatened his sister. *Id.* at 1125. Substantial evidence supported the BIA’s conclusions that the applicant “failed to establish a sufficient nexus between the murders of his relatives and their religious beliefs” as well as a sufficient showing that he would be persecuted based on his religious beliefs. *Id.* at 1126. However, the Circuit held the BIA erred in failing to address the applicant’s claim that he risks persecution by the gang due to his membership in a particular social group: his family. *Id.* McKEOWN.

Particular Social Group/Family, Guatemala (2015). The Circuit’s decision discusses “the evolving definition of the term ‘particular social group,’” focusing on *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc) and *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), in particular. *Id.* at 1126-27. In *Henriquez-Rivas*, the Circuit’s “conclusion that the persecutor’s perception matters most in determining whether a claim satisfied the social visibility requirement was unnecessary to [the] decision.” *Id.* at 1127. The BIA’s decision in *M-E-V-G* clarified that society’s perception, as opposed to the persecutor’s perception, is key to determining social distinction. *Id.* (citing *M-E-V-G-*, 26 I&N Dec. at 242). Currently, the “particular social group” standard requires the applicant to establish “that the group is ‘(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.’” *Id.* at 1127-28 (quoting *M-E-V-G-*, 26 I&N Dec. at 237). The Circuit emphasized that “the family remains the quintessential particular social group.” *Id.* at 1128 (citation omitted).

- ✱ ***Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014)** (b) (6); granting a petition for review with regard to an indigenous Guatemalan, who had been badly beaten and threatened by criminal gang members who had pursued him because he had taken “concrete steps to oppose gang membership and gang authority,” in that the IJ found that he “took specific action to dissuade his brother from continuing his membership in a criminal gang.” *Id.* at 1080. Further, Respondent “ha[d] been visible and outspoken in his actions against the gang.” *Id.* at 1080. The IJ had granted relief but the BIA reversed. REINHARDT.

Particular Social Group/Gangs, Actively Opposing Gang Authority, Found, Guatemala (2014). The Circuit’s decision builds on *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc) with regard to a PSG being made up of those who publicly testify against criminal gang members. The BIA “applied intervening authority [from the time of the IJ’s decision] and held that the purported social group of ‘those who have taken direct action to oppose criminal gangs’ was not meaningfully distinguishable from Salvadoran ‘youths who have resisted gang recruitment, or family members of such Salvadoran youth,’ the group the BIA had rejected in *Matter of S-E-G-*, 24 I&N Dec. 579, 582 (BIA 2008).” *Id.* at 1080. The decision discusses the

Board's response in *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) and *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) and finds these decisions to be "consistent with *Henriquez-Rivas*." *Id.* at 1083 n.6. The decision notes that in *W-G-R-*, a PSG of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not accepted in that "the record contained no evidence demonstrating that Salvadoran society recognized former gang members who have renounced their gang membership as a distinct social group." *Id.* at 1082 (citing *W-G-R-*, 26 I&N Dec. at 222). In *W-G-R-*, "[t]he record contained 'documentary evidence describing gangs, gang violence, and the treatment of gang members but very little documentation discussing the treatment or status of former gang members.'" *Id.* (quoting *W-G-R-*, 26 I&N Dec. at 222). "The 'scant evidence' provided by *W-G-R-* was insufficient to meet the social distinction requirement." *Id.* (quoting *W-G-R-*, 26 I&N Dec. at 222). "The BIA also found that the proposed group lacked particularity because 'the boundaries of a group are not sufficiently definable unless the members of society generally agree on who is included in the group, and the evidence that the social group proposed . . . is recognized within the society is lacking in this case.'" *Id.* at 1082-83 (quoting *W-G-R-*, 26 I&N Dec. at 221).

- * *Mendoza-Pablo v. Holder*, 667 F.3d 1308 (9th Cir. 2012) (b) (6); reversing a denial of relief. Credibility was not at issue. This is a pre-REAL ID Act case. Respondent was an indigenous Guatemalan. He makes no claim that he had ever "personally witnessed any atrocities and that he was personally challenged or confronted." The basis of the claim was that Respondent's mother, when she was eight months pregnant with him, had to flee her village in 1982 at the height of the Civil War. Certain family members died as a result of the military's attack on the village "having accused the residents of Todos Santos of aiding the guerrillas." (at 1311). As a result of this flight, respondent claimed numerous difficulties including the ability to attend school, "was often sick and frequently had nightmares," and had inadequate nutrition. (at 1311). RAKOFF (S.D.N.Y. sitting by designation). There was a strong dissent by RAWLINSON; among other things, it labeled the majority opinion as "incomprehensible."

Past Persecution/Claims by Children. "It is clear from our case law that an infant can be the victim of persecution, even though he has no present recollection of the events that constituted his persecution . . . the quantum of harm suffered by a child may be relatively less than that of an adult and still qualify as persecution." (at 1313). Past persecution was found even without any current documentation of symptoms in that "that these deprivations [from being forced to flee from the village] would have some deleterious and long-lasting effects . . . Nothing in the INA or its implementing regulations requires that a petitioner produce 'objective' or 'expert' evidence." (at 1315 & n.6). In evaluating a child's past persecution claim, the court shows great sensitivity to the harm of non-immediate family members that in this case motivated the decision to flee from the place of attack.

Persecution/Physical Harm Not Necessary, Guatemala (2012). "We have repeatedly held that physical injury is not a necessary prerequisite to persecution." (at n.4). *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996) (past persecution established by threats and violence not resulting in permanent injuries).

Changed Country Conditions/Changed Conditions Not Found, Guatemala (2012). Past persecution was found notwithstanding the inability of Respondent to identify any individual

or group who had any present interest in him, the 1996 Peace Accords, and that the problems had occurred so long ago.

- ✱ *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010) ((b) (6)); reversing and remanding a particular social group (“PSG”) claim based on “the high incidence of murder of women in Guatemala, and her own status as a Guatemalan woman.” The claim had been denied as “the group of women between the age of 14 and 40 who are Guatemalan and live in the U.S. to be too broad to qualify as a particular social group. The revised definition of “all women in Guatemala” was also held to be too broad. This case is a pre-REAL ID Act case. Respondent did not claim past persecution. The decision received wide-spread national publicity and will likely be extensively cited to support many PSG claims. It appears to conflict with such holdings as *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) and *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008), which upheld non-gender related denials of PSG claims as overbroad. PAEZ.²⁷

Dicta. The broad language that advocates will rely upon may be dismissed as dicta. “Dicta settles nothing, even in the court that utters it.” *Jama v. ICE*, 543 U.S. 335, 352 (2005). The case “consider[ed] only whether the BIA erred that women in Guatemala cannot be considered as a cognizable social group.” The circuit reversed the decision specifically “because the BIA failed to apply both prongs of the *Hernandez-Montiel* definition to Perdomo’s claim.” In *Hernandez-Montiel*, 225 F.3d 1084, 1093 (9th Cir. 2000), the circuit held that “a PSG is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.” (emphasis in original).

Particular Social Group/Gender. “Gender is an innate characteristic that is fundamental to one’s identity. *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005). . . . Female genital mutilation constitutes ‘persecution’ [given] that genital mutilation clearly occurs on account of being a woman. . . . [Hence] women in a particular country, regardless of ethnicity or clan membership could form a particular social group.”

Particular Social Group/Particularity. “We have rejected the notion that a persecuted group may simply represent too large a population to allow its members to qualify for asylum,” citing *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996). In discussing what constitutes an “innate characteristic,” the circuit noted its willingness to find the existence of an “innate characteristic” notwithstanding such “broad and internally diverse social groups as homosexuals and

²⁷ The generosity with which appellate courts review PSG decisions involving women is illustrated by *Qu v. Holder*, 618 F.3d 602 (6th Cir. 2010). The circuit reversed the denial of relief where the respondent claimed relief under the PSG of being a Chinese woman who was subjected to forced marriage and involuntary servitude. The male respondent expressed fear, having acted in a criminal manner in the actions he took against her.

In *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008) the circuit recognized PSG status for widows from Cameroon who would be obligated to marry in coercive circumstances with significant attendant risks of violence.

Gypsies,” citing *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) and *Mihalev v. Ashcroft*, 388 F.3d 722, 726 (9th Cir. 2004).²⁸

- * *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007); reversing and remanding a denial of asylum and withholding of removal. FISHER.

Bars to Asylum/Particularly Serious Crime, Factors to Consider. Respondent had been convicted of the sale of a small amount of cocaine. The respondent had been found to have established a basis for withholding of removal. Applying *Matter of Y-L*, 23 I&N Dec. 270 (AG 2002), the respondent was found to have been convicted of a PSC and hence was denied relief. The court held that it was permissible for the AG to set forth the “strong presumption that a drug trafficking offense resulting in a sentence of less than 5 years is a PSC.” (at 943). However, the standard could not be applied to convictions prior to the AG’s decision.²⁹

- * *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007) (b) (6); reversing and remanding a denial of asylum to two indigenous Guatemalan brothers; NOONAN.

Past Persecution/Claims by Children; Persecution/Of Family, Not Affirmed, Guatemala (2007). At the time in question, 1982, the two brothers were ages 9 and 7. They made no claim that they themselves had been the victims of any violence. They claimed that Guatemalan soldiers “beat the boys’ father in front of their mother and took him away.” (at 1044). In addition, their older brother was killed by government forces. The brothers feared that if they returned to Guatemala they would be viewed as guerrilla sympathizers and killed by the army. (at 1044). The court held that “injuries to a family must be considered in an asylum case where the events that form the basis of the past persecution claim were perceived when the petitioner was a child,” and the IJ must view the events “from the perspective of a small child.” (at 1045).

Credibility/Misrepresentations. The court rejected the adverse credibility finding because the misstatements were not material to the claim. (at 1045).

- * *Recinos de Leon v. Gonzales*, 400 F.3d 1185 (9th Cir. 2005) (b) (6); remanding based on inability to discern the grounds for the agency’s action; the BIA summarily affirmed an indecipherable decision of the IJ; BERZON.

²⁸ The fact that a woman claimant might be deemed a member of a PSG may still lead to a denial of relief by applying *Ayala v. Holder*, 640 F.3d 1095 (9th Cir. 2011). There, an individual was recognized to be included in a cognizable social group - former military officers from El Salvador. Relief was denied because Mr. Ayala failed to establish that the basis of his case was on account of membership in the PSG.

²⁹ In *Matter of G-K-*, 26 I&N Dec. 88, 96 (BIA 2013), the Board held that an alien was properly found to have been convicted of a PSC under *Matter of Y-L*, 23 I&N Dec. 270 (AG 2002), where the individual was convicted of conspiracy to distribute and possess with intent to distribute at least a kilogram of cocaine. There is no need for the IJ to make “a separate determination to address whether he is a danger to the community, because such a separate ‘dangerousness’ analysis is not necessary to determine that a crime is particularly serious.” At 96.

Well-Founded Fear/Ten Percent Rule, Not Affirmed, Guatemala (2005). “A reasonable possibility [that the applicant will be persecuted upon return to the country in question] may be shown even where the applicant has only a ten percent chance of being persecuted.” (at 1190).

Past Persecution/Humanitarian Asylum, Standard. “The ‘severity of the past persecution,’ 8 C.F.R. § 1208.13(b)(1)(iii)(A), is relevant only to whether an applicant is to be granted asylum in the exercise of an asylum officer’s discretion without showing a well-founded fear of future persecution. The degree of severity of past persecution is irrelevant to finding whether any past persecution *occurred*.” (at 1191–92) (internal citations omitted).

- ✱ *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814 (9th Cir. 2004) (b) (6); remanding based on finding that (1) IJ’s conclusion that alien received offer of permanent resettlement in Mexico, as would establish that alien was firmly resettled in Mexico, barring asylum, was not supported by substantial evidence, and (2) IJ’s finding that alien had 16 years of peaceful residence in Mexico was not supported by substantial evidence; TASHIMA. *Accord Maharaj v. Gonzales*, 453 F.3d 961 (9th Cir. 2006) (*en banc*).

Bars to Asylum/Firm Resettlement, Not Found, Guatemala (2004). Jacalteco Mayan Indian from Guatemala who had been issued an FM3 refugee document in Mexico had the right to renew his FM3 if deported to Mexico, and legally lived there for 16 years before coming illegally to the U.S., but continues to have no right to apply for permanent residency in Mexico and, accordingly, has not received an offer of permanent resettlement. (at 820). Applicant’s 16-year stay in Mexico may give rise to a presumption of resettlement only if it was not disrupted by threats of repatriation, travel restrictions, and other molestation or persecution and hence was not accepted. (at 820).

- ✱ *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004) (b) (6); remanding based on finding past persecution on account of political opinion; Regardless of whether Guatemalan soldiers who raped petitioner knew of her brother’s forced conscription by insurgent guerillas ten years earlier, evidence that soldiers, as a result of widespread conscription of young men in village by these insurgents, had mistakenly inferred that village was attempting to aid guerillas and had retaliated on village-wide basis by systematically targeting villagers as whole was sufficient to compel conclusion that alien’s gang rape by soldiers was motivated, at least in part, by imputed political opinion; RAWLINSON.

Persecution/Of Family, Not Affirmed, Guatemala (2004); Rape; Past Persecution/Evaluation of Context. Testimony of prolific military violence in applicant’s village demonstrated that her own attack was not an isolated incident. Although her brother’s kidnaping and forced conscription by guerilla forces occurred ten years prior to soldiers attacking and raping her, the events must be evaluated in the context of continuing brutality suffered by other villagers during that same decade. (at 1075).

Nexus/Mixed Motive, Pre REAL ID, Guatemala (2004). Soldiers’ statements to rape victim that they wanted “to be with a woman” and satisfy their “unlawful, violent, carnal desire,” and not “that they were raping her on account of a protected ground is *not* highly relevant.” The

soldiers attacked applicant because she belonged to a village they considered a guerilla stronghold, as demonstrated by their systematic targeting of everyone in the village. (at 1076).

Past Persecution/Changed Conditions Not Found, Guatemala (2004). “[R]ecent reports reflect that ‘seven years after the signing of peace accords, Guatemala has made little progress toward securing the protection of human rights and rule of law that are essential features of a functioning democracy.’” (at 1077).

- ✱ *Lopez v. Ashcroft*, 366 F.3d 799 (9th Cir. 2004) ((b) (6)); remanding based on finding that (1) harm suffered by asylum applicant rose to the level of persecution; (2) persecution was on account of politically-based refusal to cooperate with guerillas; (3) BIA’s conclusory determination regarding changed country conditions was not sufficiently individualized; GOULD; distinguished by *Khup v. Ashcroft*, 376 F.3d 898 (9th Cir. 2004).

Persecution/Physical Harm, Not Affirmed, Guatemala (2004); Threats, Not Affirmed, Guatemala (2004); Medical Attention. “The credible testimony made plain that [applicant] had been placed in a burning warehouse by guerillas, bound so he could not escape absent help, and had suffered additional threats on his life from the same group. That [applicant] did not seek medical treatment for the burns he suffered is hardly the touchstone of whether his treatment by guerillas amounted to persecution.” (at 803).

Nexus/Motive Found, Pre REAL ID, Guatemala (2004); Persecution/Forced Conscription, Guatemala (2004). While forced recruitment alone does not constitute a basis for asylum, applicant’s punishment by guerillas for his pro-establishment political opinions was persecution on account of political opinion. (at 804).

Past Persecution/Individualized Analysis, Guatemala (2004). “If past persecution is shown, the BIA cannot discount it merely on a say-so. Rather, our precedent establishes that in such a case the BIA must provide an individualized analysis of how changed conditions will affect the specific petitioner’s situation.” (at 805) (citation and internal quotation marks omitted).

- ✱ *Ventura v. INS*, 317 F.3d 1003 (9th Cir. 2003) (*reh’g of* 264 F.3d 1150 (9th Cir. 2001) *on remand from the U.S. Supreme Court*, 537 U.S. 12 (2002)) ((b) (6)); remanding and instructing that in the event BIA reopened record on remand to consider issue of whether changed circumstances in alien’s home country rebutted presumption that he had a well-founded fear of persecution on account of political opinion imputed to him, it was required to also consider allowing alien to present new evidence of family persecution which he sought to present by his motion to reopen, together with any other current evidence of such family circumstances. The decision in 2001 held that (1) alien had been subjected to past persecution by guerrillas in his native Guatemala; (2) persecution was on account of an imputed political opinion, so that presumption arose that alien had a well-founded fear of future prosecution; and (3) INS failed to present evidence of changed country conditions sufficient to rebut presumption of future persecution. SCHROEDER, LAY (8th Cir.) and THOMPSON.

Persecution/Of Family, Not Affirmed, Guatemala (2003). Alien was subjected to past persecution in his native Guatemala, as would potentially make him eligible for grant of asylum

and withholding of deportation, where just prior to his departure from country guerrillas had spray-painted three “notes” on wall of his house, demanding that he join their forces and threatening harm to alien and his family if he did not, and relatives of alien, some of whom were in Guatemalan military, had been subjected to physical attacks by, and threats from, guerrillas. (2001 decision).

Persecution/Forced Conscription, Guatemala (2003). Forced recruitment of alien without evidence of a discriminatory purpose is insufficient to compel a finding of past persecution on account of political opinion, as will make alien eligible for grant of asylum and withholding of deportation. (2001 decision).

Political Opinion/Imputed, Found, Guatemala (2003). Past persecution of alien in his native Guatemala by guerrillas, who demanded that he join their forces and threatened harm to alien and his family if he did not, was on account of an imputed political opinion, so that presumption existed that alien had a well-founded fear of future prosecution which would potentially warrant grant of asylum and withholding of deportation; alien gave credible, uncontradicted testimony that guerrillas targeted him because they believed he held anti-guerrilla sympathies, that his uncle was attacked and one of his cousins was killed by guerrillas because of their military affiliations, and that he was closely associated with another of his cousins, who was an army lieutenant. (2001 decision).

Past Persecution/Failure to Rebut, Guatemala (2003). INS failed to present evidence of changed country conditions sufficient to rebut presumption that alien had a well-founded fear of future persecution in his native Guatemala, which arose from evidence indicating that alien had been subjected to persecution based on imputed political opinion, and thus, alien was eligible for grant of asylum, and entitled to withholding of deportation; while peace agreement had been entered and cease-fire declared in Guatemala, guerrillas continued to employ death threats, and State Department report indicated that situation was unlikely to improve significantly in the short term. (2001 decision).

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- ✕ *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002) (b) (6); remanding based on findings that (1) IJ denied alien due process by failing to provide him with full and fair hearing and reasonable opportunity to present evidence; (2) alien was prejudiced by such denial of due process; and (3) BIA did not abuse its discretion in refusing to reopen for consideration under Convention; TROTT.

Due Process/Full and Fair Hearing. IJ denied alien due process by failing to provide him with full and fair hearing and reasonable opportunity to present evidence, where IJ went off record to tell alien before he had opportunity to present oral testimony or documents in support of his asylum application that he had no basis for asylum claim, IJ then presented alien with Hobson’s choice of proceeding with claim labeled as baseless or dropping claim and receiving six months to make departure arrangements, and IJ apparently did not discuss with alien his option to appeal.

Motion to Reopen/Failure to Show Claim. BIA did not abuse its discretion in refusing to reopen deportation case for consideration under Convention Against Torture, inasmuch as alien’s evidence did not demonstrate it was more likely than not he would be tortured with consent or acquiescence of public official if returned to Guatemala.

- ✱ ***Ruano v. Ashcroft*, 301 F.3d 1155 (9th Cir. 2002)** (b) (6); granting withholding and remanding for asylum determination; (1) alien showed that he was unwilling or unable to return to his home country because of well-founded fear of persecution on account of his membership in particular social group or political opinion, and (2) alien was entitled to withholding of deportation; D.W.NELSON; *called into doubt by Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995 (9th Cir. 2003); *distinguished by Nahrvani v. Gonzales*, 399 F.3d 1148 (9th Cir. 2005).

Withholding of Deportation/Granted, Guatemala (2002). Alien, an officer of the Guatemala City chapter of the UCN political party, received death threats in the mail from a guerrilla organization and was tracked by four armed men on several occasions. IJ determined that his past treatment did not rise to the level of persecution, and that State Department report indicated that only high-level activists were targeted and only in their home communities. BIA affirmed, relying on *Lim v. INS*, 224 F.3d 929 (9th Cir. 2000) in determining that prior threats did not amount to persecution. The Court of Appeals distinguished *Lim* because here the alien was closely confronted by pursuers. The State Department report was insufficient to show changed country conditions or that alien could find safety elsewhere in Guatemala because it did not address his claim on an individualized basis.

- ✱ ***Rios v. Ashcroft*, 287 F.3d 895 (9th Cir. 2002)** (b) (6); granting withholding and remanding for asylum determination; (1) aliens suffered past persecution; (2) past persecution was on account of imputed political opinion; (3) State Department report did not establish changed conditions sufficient to overcome presumption of well-founded fear of future persecution; PREGERSON; *called into doubt by Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995 (9th Cir. 2003).

Persecution/Threats, Not Affirmed, Guatemala (2002); Physical Harm, Not Affirmed, Guatemala (2002); Kidnaping; Of Family, Not Affirmed, Guatemala (2002). Applicants suffered past persecution within meaning of asylum statute where anonymous callers repeatedly threatened to kill family of the applicants (the applicants are the wife and son of a Guatemalan army colonel), guerrillas wounded wife-applicant so severely that she was hospitalized for one month with severed tendons in her hand, guerrillas kidnaped wife-applicant, guerrillas attempted to kidnap son-applicant, and guerrillas murdered colonel and wife-applicant's brother.

Nexus/Motive Found, Pre REAL ID, Guatemala (2002). Past persecution of applicants was on account of imputed political opinion within meaning of asylum statute, where guerrillas told wife-applicant that they abducted and wounded her because her husband and brother were members of Guatemalan army, and confirmed that colonel was son's father before attempting to abduct son.

Past Persecution/Changed Conditions Not Found, Guatemala (2002); Country Reports, Use Of Rejected, Guatemala (2002). State Department report prepared in 1998, indicating that peace accord had been signed by Guatemalan National Revolutionary Unity Guerrillas in 1996 and that many guerrilla forces were now disarmed, did not establish that conditions had changed in Guatemala since 1991 sufficiently to overcome presumption of well-founded fear of future

persecution, for purposes of asylum application filed by wife-applicant and son-applicant of Guatemalan army colonel.

Well-Founded Fear/Continued Family Presence, Guatemala (2002). Fact that wife-applicant's sister and parents continued to live in Guatemala was insufficient to overcome presumption of well-founded fear of future persecution, for purposes of asylum application filed by wife and son of Guatemalan army colonel; sister and parents were not related to colonel and there was no evidence they had been assaulted or threatened.

- * *Perez-LASTOR v. INS*, 208 F.3d 773 (9th Cir. 2000); remanding upon finding that incompetent translation prejudiced asylum applicant; PREGERSON; (O'SCANNLAIN, dissenting, notes that neither the applicant nor the record indicates how correct translations at the hearing could have refuted the BIA's adverse credibility determination).

Due Process/Translation. Translation from Quiche language provided to Guatemalan asylum applicant was incompetent, for purposes of due process claim; applicant's answers frequently were not responsive to questions asked, applicant repeatedly expressed difficulty understanding translation, and applicant never understood some questions, despite repetition of questions.

Applicant was prejudiced by incompetent translation from Quiche language provided in deportation hearing, and thus was denied due process; alien's inability to understand questions of IJ prevented him from explaining why he did not provide Quiche or Spanish language version of declaration that IJ refused to admit on ground that it was not in language applicant could understand, IJ disbelieved applicant's testimony because he could not communicate effectively, and IJ exacerbated translation problems by aggressively cross-examining applicant.

- * *Chanchavac v. INS*, 207 F.3d 584 (9th Cir. 2000) ((b) (6)); reversing and remanding; (1) alien suffered past persecution by Guatemalan military and thus was entitled to legal presumption of well-founded fear of persecution; (2) alien's persecution was on account of imputed political opinion; (3) State Department Country Report did not establish changed country conditions sufficient to rebut presumption; and (4) alien was eligible for withholding of deportation; PREGERSON; (O'SCANNLAIN, dissenting, indicated that petitioner has not adduced evidence that is so compelling that no reasonable factfinder could fail to find persecution); *called into doubt by Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995 (9th Cir. 2003).

Credibility - Pre-REAL ID/IJ Speculation, Not Affirmed, Guatemala (2000). Inasmuch as record contained no materially inconsistent testimony, IJ's reasons for doubting credibility stemmed from IJ's personal conjecture about what was expected behavior of Guatemalan Indian, and were likely attributable to translation difficulties.

Persecution/Physical Harm, Not Affirmed (2000); Of Family, Not Affirmed (2000); Generalized Violence, Guatemala, 2000. Asylum applicant, who was Quiche Mayan Indian, suffered past persecution by Guatemalan military, and thus was entitled to legal presumption of well-founded fear of persecution, where military broke into his home and beat him so severely that he was bedridden for two days, military beat his father, applicant testified about

prolific military violence in his town, including killings of his brother and grandfather, and, although attempted recruitment by guerillas prompted applicant to flee Guatemala, he consistently testified he feared both military and guerillas.

Nexus/Motive Found, Pre REAL ID, Guatemala (2000); Political Opinion/Imputed, Found, Guatemala (2000). Asylum applicant's persecution by Guatemalan military was based on military's incorrect belief that applicant supported guerillas, and thus was on account of protected ground of imputed political opinion, where military accused applicant of being guerrilla and demanded information about his "guerrilla friends" while beating him, and there was no evidence that military wanted to punish him for not joining their ranks.

Past Persecution/Failure to Rebut, Guatemala (2000); Country Reports/To Rebut Past Persecution, Insufficient, Guatemala (2000). State Department Country Report for Guatemala issued in 1995 did not establish changed country conditions sufficient to rebut presumption that asylum applicant had well-founded fear of future persecution; report stated that human rights violations continued at alarming rate, and, although report stated that persons who failed to report for military service were not prosecuted, applicant did not fear military induction, but feared being beaten and killed by military on account of imputed sympathy for guerrillas.

- ✱ *Escobar-Grijalva v. INS*, 206 F.3d 1331 (9th Cir. 2000) (as amended by 213 F.3d 1221 (9th Cir. 2000) (b) (6)); remanding based on finding that applicant was denied statutory right to counsel when, inter alia, IJ allowed her to be represented by attorney whom she had never met and who had no understanding of her case; NOONAN; (O'SCANNLAIN, dissenting, notes that the majority failed to address the merits of the claim).

Counsel/Right To. IJ denied asylum applicant her statutory right to counsel when he allowed her to be represented by attorney whom she had not previously met and who had no understanding of her case, after giving her choice of being represented by such attorney, representing herself, or obtaining continuance to obtain new counsel, in which case she would not be permitted to choose first attorney or any of six other attorneys listed by IJ; applicant's response did not clearly indicate that she chose first attorney, IJ did not give first attorney opportunity to talk to applicant, and IJ, in excluding attorneys, confused first attorney with attorneys from law office that had previously represented applicant.

- ✱ *Jacinto v. INS*, 208 F.3d 725 (9th Cir. 2000); reversing and remanding based on a lack of a full and fair hearing; BRIGHT; (TROT, dissenting, argues that petitioner acknowledged understanding of her rights, and her case was aided by, not hurt by, the IJ).

Due Process/Full and Fair Hearing; Pro Se. Alien appearing without counsel while seeking asylum, withholding of deportation, and voluntary departure did not receive full and fair hearing, as required by due process clause; IJs failed to sufficiently explain that she could be witness even if she obtained attorney, inadequately explained hearings' procedures, and failed to explain what she had to prove to establish asylum, and she was told she would be questioned by IJ and counsel for government but not that she could present her own affirmative testimony in narrative form.

Due Process/IJ Failure to Advise. Matters related to alien's credibility might have been resolved differently if alien had received information about her right to present direct narrative testimony, and alien's responses to questioning of IJ indicated that she did not understand procedures in which she was engaged or implications of her answers.

- * *Cordon-Garcia v. INS*, 204 F.3d 985 (9th Cir. 2000) ((b) (6)); remanding based on findings that (1) alien established past persecution based on imputed political opinion; (2) alien had well-founded fear of future persecution, assuming her testimony was credible; and (3) remand for consideration of credibility was warranted; TROTT.

Nexus/Motive Found, Pre REAL ID, Guatemala (2000). Alien's abduction and beating by guerrilla in Guatemala was on account of imputed political opinion, and she thus established past persecution for purposes of asylum claim, where abductor informed her that her teaching of adult literacy on behalf of government was undermining guerrillas' recruitment efforts, and told her that she would have to decide whether she was going to work with guerrillas or government.

Well-Founded Fear/Guatemala, Objectively Reasonable, Found. Alien had well-founded fear of future persecution, assuming credibility of her testimony that her family told her that guerillas were looking for her because she had taught adult literacy for government, and that, after she left Guatemala, guerillas killed her father and uncle after inquiring about their relationship to her.

Evidence/Hearsay. "The INS complains that all of this information is founded upon hearsay, and, at times, hearsay upon hearsay. This may be true. However, because this court does not require corroborative evidence, *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996), that Petitioner's testimony may be based upon hearsay is of no effect. This court recognizes the serious difficulty with which asylum applicants are faced in their attempts to prove persecution, see *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1985), and has adjusted the evidentiary requirements accordingly." (at 992-93).

- * *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) ((b) (6)); remanding upon finding (1) past persecution, (2) country conditions evidence failed to rebut presumption that alien possessed well-founded fear of future persecution, and (3) alien was entitled to withholding of deportation; REINHARDT; distinguished by *Nagoulko v. INS*, 333 F.3d 1012 (9th Cir. 2003); *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004); *Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. 2004).

Persecution/Harassment; Discrimination, Not Affirmed, Guatemala (1999). Asylum applicant established past "persecution," as opposed to mere "discrimination," where alien testified credibly, and consistently with country conditions documentary evidence, that, following his conscription into Guatemalan army, he witnessed and was victim of repeated beatings and severe verbal harassment by his Hispanic superiors accompanied with verbal insults referring to his status as Indian, and that he was threatened with death when he complained to his commanding officer.

Past Persecution/Failure to Rebut, Guatemala 1999. Country conditions evidence offered by INS did not rebut presumption that asylum applicant possessed well-founded fear of future persecution as result of having been beaten and threatened with death based on his Indian status while serving in Guatemalan army; State Department Profile described frequent claims of government-sponsored or condoned mistreatment of Indians.

- ✕ *Ordonez v. INS*, 137 F.3d 1120 (9th Cir. 1998) ((b) (6)); remanding upon finding BIA abused its discretion by precluding consideration of other hardship factors; T.G.NELSON; subsequent appeal based on insufficient voluntary departure notice at 345 F.3d 777 (9th Cir. 2003).

Suspension of Deportation/Persecution as Evidence of Hardship. BIA abused its discretion when, in addressing alien's allegations of persecution in context of extreme hardship analysis of application for suspension of deportation, it limited its inquiry to whether alien had shown persecution on account of political conditions in Guatemala, thus precluding itself from considering other relevant hardship factors, including alien's claim that, as person who had resigned from police force, he would be met with certain death if forced to return. That alien's extreme hardship claim cannot be forced within one of the factors listed in *Matter of Anderson* is not automatic bar to suspension of deportation application. Requirement of *Astrero*, that BIA consider all relevant factors in deciding application for suspension of deportation, does not contemplate any existing list of categories, but rather that BIA fully and completely consider all facts which bear on extremity of hardship which deportation may inflict.

Haiti

Chronology

- ✱ *Ridore v. Holder*, 696 F.3d 907 (9th Cir.)
- ✱ *Joseph v. Holder*, 600 F.3d 1235 (9th Cir. 2010)
- ✱ *Brezilien v. Holder*, 565 F.3d 1163 (9th Cir. 2009)
- ✱ *Doissaint v. Mukasey*, 538 F.3d 1167 (9th Cir. 2008)
- ✱ *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988)

✓ *Affirmed*

✱ *Not Affirmed*

- ✱ *Ridore v. Holder*, 696 F.3d 907 (9th Cir.) (b) (6); remanding a denial of relief. Respondent had a lengthy criminal record. The IJ granted CAT relief. DHS appealed. The Board reversed, applying *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), “in which the BIA rejected a similar claim for CAT protection based on the detention and life-threatening conditions criminal deportees allegedly faced in Haitian prisons.” At 910. Credibility was not at issue. FISHER.

CAT/Lawful Sanction. The court notes the provision of 8 C.F.R. § 1208.18(a)(3) that: “Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” At 917. The decision rejects the Board’s effort to find such imprisonment to be “lawful” and that it had not addressed the IJ’s finding that such would not be “lawful” due to the “declining deplorable conditions . . . and Ridore’s minor criminal record.” At 918. These included a number of crimes against property, a series of driving offenses, and possession of drug paraphernalia.

CAT/More Likely Than Not, Found, Haiti (2012). “The IJ found that, unlike the respondent in *In re J-E-*, Ridore ‘has no family in Haiti who can arrange with the authorities to have [him] released into their custody.’” At 919.

- ✱ *Joseph v. Holder*, 600 F.3d 1235 (9th Cir. 2010) (b) (6); reversing and remanding a pre-REAL ID Act case on credibility grounds. Respondent asserted he had been a political activist on behalf of the Lavalas political party and then President Aristide. He had suffered threats of physical violence both to himself and his family. The IJ relief upon her unrecorded notes taken at a bond hearing five months earlier in finding material inconsistencies between the versions of the respondent’s story, as well as for other reasons. PREGERSON.

Bond/Notes from Hearing. The court held that it was error to have relied on the notes when “no transcript exists for Joseph’s bond hearing. No effort was made to introduce specific evidence of the precise content of Joseph’s oral statements made at his unrecorded bond hearing.” There was a concurrence by Judge Graber. She writes that in another situation, “statements made at a bond hearing may be admissible and may support an adverse credibility determination.” However, she found that the IJ notes “lack sufficient indicia of reliability to constitute an adequate basis for an adverse credibility determination.” If there had been a recording and “a transcript of the proceedings was available, neither the regulations nor common sense would prohibit the use of statements made by the petitioner or by other witnesses.” 8 C.F.R. § 1240.7(a).

Credibility - Pre-REAL ID/Bond Hearing, Airport Interview. “We have rejected adverse credibility findings that relief on differences between statements a petitioner made during removal proceedings and those made during less formal, routinely unrecorded proceedings. Two examples . . . are airport interviews and affirmative asylum interviews.” *Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir. 2003); *Singh v. INS*, 292 F.3d 1017, 1021 (9th Cir. 2002).

Credibility - Pre-REAL ID/Corroboration Not Required, Haiti (2010); IJ Speculation, Not Affirmed, Haiti (2010); Detail, Lack Of (2010). Additionally, the IJ denied the claim based on what she felt had been the failure of the respondent to provide sufficient detail, a lack of understanding of the political situation, the failure to depart Haiti sooner, and the failure to submit sufficient corroborative evidence. These reasons were dismissed as not going to “the heart of the claim” or impermissible “speculation or conjecture.” Given the court’s finding that Joseph is deemed credible, no corroborating evidence could be required.

- ✱ *Brezilien v. Holder*, 565 F.3d 1163 (9th Cir. 2009) (b) (6); reversing and remanding a denial of relief. On three occasions an IJ granted asylum or related relief and each time the Board reversed upon DHS appeal. The respondent claimed to be a strong supporter of former Haitian President Aristide. He further claimed that his father had been shot because of his activities and that he had been threatened. Credibility was not at issue. He fled Haiti at age 16. He was granted asylum by the then INS and became an LPR in 1994. He returned to Haiti three times thereafter. In 2000, he was convicted of attempted aggravated assault against the mother of his child. He was placed in proceedings and again requested asylum. The Board’s reversal on asylum was based on three grounds: (1) the events which formed the basis of his claim had occurred 12 years earlier and were deemed too remote in time to any present claim; (2) he had not shown that the claimed death of other family members in Haiti were related to their claimed political activity; and (3) he had been able to return to Haiti three times without incident. The IJ also granted relief under CAT on the basis that “criminal deportees who are returned to Haiti are detained for an indeterminate amount of time and that conditions of detention in a Haitian prison could amount to torture.” PAEZ.

Board of Immigration Appeals/Jurisdiction. Because the Board engaged in “impermissible fact finding,” its reversal of the IJ’s decision could not stand.

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- ✱ ***Doissaint v. Mukasey*, 538 F.3d 1167 (9th Cir. 2008)** (b) (6); reversing a denial of a motion to reopen to seek relief under CAT. The court found that the BIA had “ignored” an assignment of error in a direct case appeal. It further held that the Board could not “cure this legal error in its subsequent consideration of petitioner’s motion to reopen.” (at 1170). GRABER.
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- ✱ ***Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988)**; reversing and remanding based on finding alien had presented evidence of successive and specific threats on his life, on basis of the imputed political opinion in context of systemic human rights abuses linked to extortion by government security agents, thereby establishing eligibility for asylum; TANG; *declined to extend by Prasad v. INS*, 47 F.3d 336 (9th Cir. 1995).

Persecution/Extortion. Beatings, imprisonment, and assaults by government security forces for purposes of extortion may constitute persecution on account of political opinion.

Persecution/Arrests, Haiti (1988); Physical Harm, Not Affirmed, Haiti (1988). Alien credibly testified he had been arrested three times, severely beaten on several occasions, and directly fired upon by an officer who recognized him; these abuses resulted because of alien’s failure to make “contributions” to the Macoutes upon demand.

Country Reports/To Support Claim, Sufficient, Haiti (1988). “The record also contains substantial evidence that the Haitian government under Duvalier operated as a ‘kleptocracy,’ or government by thievery, from the highest to the lowest level. The Ton Ton Macoutes, an elaborate network of official and semi-official security forces, factions of which were fiercely loyal to the Duvalier family, formed the heart of the system. Because the Macoutes often went unpaid except for a few of their highest ranking officers, they depended on their fellow Haitians for their livelihood, a circumstance encouraging wide-scale corruption, extortion and violence. Refusal to comply with extortionate demands resulted in the attribution of anti-government sympathies and also in swift reprisals, including beatings, imprisonment and death.” (at 727).

Honduras

Chronology

- ✗ *Hernandez v. Holder*, 738 F.3d 1099 (9th Cir. 2013)
- ✗ *Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011)
- ✓ *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009)
- ✓ *Castro-Perez v. Gonzales*, 409 F.3d 1069 (9th Cir. 2005)
- ✓ *Lainez-Ortiz v. INS*, 96 F.3d 393 (9th Cir. 1996)
- ✗ *Ramos-Vasquez v. INS*, 57 F.3d 857 (9th Cir. 1995)

✓ *Affirmed*

- ✓ ***Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009)**; affirming a denial of relief to an individual who claimed particular social group (PSG) status as “young Honduran men who have been recruited by the MS 13, but who refuse to join.” Credibility was not an issue. Respondent testified that he had been threatened at gun point along with a friend “that they could either join the MS 13 or be killed.” There had not been a claim of actual physical violence. TASHIMA.

Particular Social Group/Gangs, Not Found, Honduras (2009). The Court reviewed a number of decisions, including *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007); *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008), for the proposition that those threatened by the criminal gang and who made up the proposed group did not have the requisite “social visibility” or “particularity” to form a basis for protection.

Political Opinion/Not Found, Honduras (2009). The court again relied on *Santos-Lemus* to find that “the refusal to join MS without more does not constitute a ‘political opinion.’” The court further found no basis for imputed political opinion despite the petitioner’s strong disagreement with the gang’s activity.

- ✓ ***Castro-Perez v. Gonzales*, 409 F.3d 1069 (9th Cir. 2005)** (b) (6); upholding BIA’s summary affirmance of IJ’s denial of asylum, withholding, and CAT; government’s unwillingness or inability to curb domestic violence is distinguishable from its treatment of rape as a separate criminal offense; Respondent was raped by Hernandez, “a member of a powerful local criminal gang . . . She did not report the rape to the police because she believed the police would not investigate a date rape, and because she was afraid of how her father would react.” (at 1070–71). Thereafter, he again raped her. At evidentiary hearing she testified that if she returned to Honduras, “Hernandez and his friends would find her and her son and harm them . . . [S]he believed the Honduran police would be of no help . . . Hernandez had sworn to find her and had attempted to enter the United States on two occasions to do so.” (at 1071). The Respondent’s testimony was accepted as fully credible. (at 1071); THOMPSON.

Unable or Unwilling to Control/Private Agent, Honduras (2005). “[H]er asylum claim fails because she has not shown that an agent of the government of Honduras committed the rapes or that the government of Honduras is unable or unwilling to control rape in that country.” (at 1072). The personal criminal acts of Hernandez were not found to form an objective basis for relief.

Unable or Unwilling to Control/Criminal Statute. Even assuming prior rapes by gang leader boyfriend constituted past persecution on account of membership in a particular social group, alien has not shown the government unwilling or unable to control rape. Although Country Report shows domestic violence is widespread, Honduras treats rape as a separate offense, classifying it as a public crime carrying a 3 to 9 year prison sentence. (at 1072).

Unable or Unwilling to Control/Failure to Report. “[Alien] testified that she did not report her rapes to the police because she ‘thought they were not willing to do anything because they would say that we were boyfriend and girlfriend and that they would not say or think that that was [not] normal.’ She also testified she was afraid of how her father, who had beaten her in the past, would react. Apart from this testimony, which does not compel a finding that the Honduran government is unwilling or unable to control rape in that country, the record is limited to the information contained in the *Country Report* profile of Honduras. That information is not particularly enlightening.” (at 1072).

CAT/Raised as Claim. Alien must specifically and distinctly raise and argue claim under CAT and cannot simply argue she met the standard for withholding and therefore has also met the more likely than not standard under CAT, as the two have distinct standards. *See Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001). (at 1072).

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- ✓ *Lainez-Ortiz v. INS*, 96 F.3d 393 (9th Cir. 1996) ((b) (6)); upholding BIA’s denial of motion to reopen to apply for asylum; petition denied; SCHWARZER; (REINHARDT, dissenting, interpreted the regulations to require a petitioner who has not previously filed for asylum and moves to reopen in order to do so, need only provide a reasonable explanation for his failure to apply earlier and does not have to provide previously unavailable, material evidence).

Motion to Reopen/No New Evidence. “In the instant case, petitioner’s motion to reopen did not claim to offer evidence previously unavailable; it only explained his previous failures to claim asylum and described his activities in Honduras upon which he justifies his fear of persecution. Accordingly, there was no basis upon which the BIA could have found that any new facts were being offered.” (at 396).

✕ *Not Affirmed*

- ✕ *Hernandez v. Holder*, 738 F.3d 1099 (9th Cir. 2013); reversing a BIA refusal to consider a motion to reopen. The respondent had sought, inter alia, a grant of asylum. A late appeal was filed which was dismissed by the Board for lack of jurisdiction. Subsequently, a motion to reopen was filed asserting “ineffective assistance of counsel.” The Board again

found it did not have jurisdiction and asserted that “the place of filing” should be before the IJ. *Id.* at __ (citing *Matter of Mladineo*, 14 I&N Dec. 591 (BIA 1974)). CHRISTEN, District Court Judge.

Motion to Reopen/BIA Jurisdiction (2013). The court holds that “the Board’s place of filing rule is a procedural claims processing rule, not a jurisdictional bar to the Board’s authority to consider a motion to reopen.” Further, “[i]n *Mladineo*, the Board used its certification authority under 8 C.F.R. § 1003.1(c) to consider a motion to reopen that should have been filed with the IJ under the place of filing rule. The Board could not have done this if the place of filing rule were jurisdictional. We conclude that the place of filing rule is not jurisdictional in character.” *Id.* at __.

- * *Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011) ((b) (6)); reversing and remanding a denial of relief under CAT. Respondent is a black “former gang member” of the “Crips.” He has a long criminal record including a conviction for possession of cocaine for sale which led to his being found ineligible for asylum and withholding of removal. “Because the BIA failed to give reasoned consideration to potentially dispositive testimony by Cole’s expert witnesses and did not address all of Cole’s claims, we grant the petition and remand to the BIA.” (at 764). Cole had been “tattooed with gang-related symbols and letters on his face and body.” (*Id.*). Cole, in the US, had been the victim of a grievous gang related “drive-by shooting; he was seriously injured and needs ongoing medical care.” (*Id.*). The crux of the claim was that because of the highly visible tattoos he had been the subject of great violence in the US from “Hispanic gang members” who “hate the Crips and kill Crips gang members” and would face similar problems if he had to return to Honduras. Credibility was not at issue. (at 765). There were three opinions. The majority was written by BERZON. There was a concurrence by NOONAN. He simply notes: “Cole’s peril comes from his possession of tattoos. If the ... tattoos are removed, or if Cole declines to seek removal of the tattoos, I vote to deny Cole any further delay in his deportation.” (at 775). There was a dissent by CALLAHAN. She notes that Cole has no “incentive to remove his tattoos...it is doubtful that the BIA could force Cole to remove his tattoos” citing to *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010) (tattooing is fully protected by the First Amendment). (at 787 n.10). “Basing CAT relief on a tattoo would appear to encourage an individual who does not want to be deported to his home country to get a tattoo that is offensive in his home country (even if it is not necessarily offensive in the United States) and refuse to have it removed.” (at 787).

CAT/More Likely Than Not, Found, Honduras (2011). The experts’ opinions had not been found to be persuasive because:

1. Specific instances of “individuals similarly situated to Cole [who] had been incarcerated and tortured” had not been shown;
2. “Torture is against the law in Honduras, and the state has prosecuted police officers for torture;”
3. “Lack of medical care and poor prison conditions in Honduras [which were claimed to] amount to torture [do not] meet the standard of specific intent to cause harm established in *Villegas v. Mukasey*, 523 F.3d 984 (9th Cir.2008).” (at 769).

In its reversal, the Circuit finds that reliance on the general provisions of the current Department of State report could not trump the specific views of the experts. Further, “that a country's constitution prohibits torture does not establish that the country does not torture people.” See *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001). (at 772 n.8). Cole’s argument that “medical care would be intentionally withheld because of his gang tattoos, and that he, specifically, was likely to need medical care due to his brain injury” was “ignored.” (at 774).

CAT/Tattoo Removal. Relief had been denied, in part, because Cole “have his tattoos removed so that he would not be perceived as a gang member upon return to Honduras.” (at 774). Judge Berzon seems far more willing, than the others on the panel, to totally reject this by characterizing tattoo removal as “quite long and extremely painful ... the process can leave permanent scarring ... there is a far greater demand for tattoo removal in Honduras than there are places that can provide such services.” (*Id.*).

- ✱ *Ramos-Vasquez v. INS*, 57 F.3d 857 (9th Cir. 1995); vacating and remanding based on finding that (1) BIA’s adverse credibility determination was not based on substantial evidence; (2) BIA did not abuse its discretion in finding that shooting of applicant by soldier who mistook him for his father was not evidence of persecution; (3) BIA did not abuse its discretion in rejecting applicant’s claim that he feared persecution by rebels; (4) BIA’s failure to be explicit about which standard it was applying was reversible error; and (5) remand was required for BIA to consider applicant’s testimony regarding treatment of military deserters and whether his desertion qualified as political opinion for which he was reasonably likely to face persecution; T.G.NELSON; (TROT, concurring, rejects the majority’s guidance offered to the BIA on the execution of military deserters).

Well-Founded Fear/Objectively Reasonable, Not Found, Honduras (1995). Alien’s apprehension that he would suffer reprisals by anti-military forces who will impute to him the actions of the military was not enough to establish a well-founded fear of persecution because he offered no evidence in support of this claim. (at 861).

Persecution/Random Attack, Honduras (1995). Shooting of alien by a soldier who mistook him for his father was an incident of isolated violence; alien did not argue that the shooting was in any way due to his own political opinion, and “a case of mistaken identity, at least under these circumstances, is not tantamount to persecution.” (at 861).

Political Opinion/Desertion. If soldier deserts in order to avoid participating in acts condemned by international community as contrary to basic rules of human conduct, and is reasonably likely to face persecution should he return to his native country, his desertion may be grounds for asylum based on political opinion.

India

Chronology

- ✓ *Singh v. Lynch*, 802 F.3d 972 (9th Cir. 2015)
- ✗ *Singh v. Holder*, 764 F.3d 1153 (9th Cir. 2014)
- ✓ *Singh v. Holder*, 753 F.3d 826 (9th Cir. 2014)
- ✗ *Kumar v. Holder*, 728 F.3d 993 (9th Cir. 2013)
- ✓ *Cheema v. Holder*, 693 F.3d 1045 (9th Cir. 2012)
- ✗ *Nijjar v. Holder*, 689 F.3d 1077 (9th Cir. 2012)
- ✓ *Latter-Singh v. Holder*, 668 F.3d 1156 (9th Cir. 2012)
- ✗ *Singh v. Holder*, 656 F.3d 1047 (9th Cir. 2011)
- ✗ *Singh v. Holder*, 649 F.3d 1161 (9th Cir. 2011)
- ✓ *Singh v. Holder*, 638 F.3d 1264 (9th Cir. 2011)
- ✗ *Vahora v. Holder*, 641 F.3d 1038 (9th Cir. 2011)
- ✓ *Singh v. Holder*, 637 F.3d 1063 (9th Cir. 2011)
- ✓ *Sharma v. Holder*, 633 F.3d 865 (9th Cir. 2011)
- ✓ *Saval v. Holder*, 649 F.3d 1066 (9th Cir. 2011)
- ✓ *Fernandes v. Holder*, 613 F.3d 938 (9th Cir. 2010)
- ✗ *Chawla v. Holder*, 599 F.3d 998 (9th Cir. 2010)
- ✓ *Khan v. Holder*, 584 F.3d 773 (9th Cir. 2009)
- ✗ *Kaur v. Holder*, 561 F.3d 957 (9th Cir. 2009)
- ✓ *Ahir v. Mukasey*, 527 F.3d 912 (9th Cir. 2008)
- ✓ *Goel v. Gonzales*, 490 F.3d 735 (9th Cir. 2007)
- ✗ *Singh v. Gonzales*, 491 F.3d 1019 (9th Cir. 2007)
- ✓ *Kohli v. Gonzales*, 473 F.3d 1061 (9th Cir. 2007)
- ✗ *Kumar v. Gonzales*, 444 F.3d 1043 (9th Cir. 2006)
- ✗ *Singh v. Gonzales*, 439 F.3d 1100 (9th Cir. 2006)
- ✗ *Bhasin v. Gonzales*, 423 F.3d 977 (9th Cir. 2005)
- ✓ *Kaur v. Gonzales*, 418 F.3d 1061 (9th Cir. 2005)
- ✗ *Singh v. Gonzales*, 403 F.3d 1081 (9th Cir. 2005)
- ✗ *Singh v. Ashcroft*, 393 F.3d 903 (9th Cir. 2004)
- ✗ *Kaur v. Ashcroft*, 388 F.3d 734 (9th Cir. 2004)
- ✗ *Cheema v. Ashcroft*, 383 F.3d 848 (9th Cir. 2004)
- ✗ *Kaur v. Ashcroft*, 379 F.3d 876 (9th Cir. 2004)
- ✗ *Singh v. Ashcroft*, 367 F.3d 1182 (9th Cir. 2004)
- ✓ *Singh v. Ashcroft*, 367 F.3d 1139 (9th Cir. 2004)
- ✗ *Singh v. Ashcroft*, 362 F.3d 1164 (9th Cir. 2004)
- ✓ *Singh v. Ashcroft*, 361 F.3d 1152 (9th Cir. 2004)
- ✓ *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004)
- ✓ *Singh v. Ashcroft*, 351 F.3d 435 (9th Cir. 2003)
- ✓ *Malhi v. INS*, 336 F.3d 989 (9th Cir. 2003)
- ✗ *Singh v. Ashcroft*, 301 F.3d 1109 (9th Cir. 2002)

- ✗ *Singh v. INS*, 292 F.3d 1017 (9th Cir. 2002)
- ✗ *Kaur v. INS*, 237 F.3d 1098 (9th Cir. 2001)
- ✗ *Kataria v. INS*, 232 F.3d 1107 (9th Cir. 2000)
- ✗ *Shah v. INS*, 220 F.3d 1062 (9th Cir. 2000)
- ✗ *Sidhu v. INS*, 220 F.3d 1085 (9th Cir. 2000)
- ✗ *Maini v. INS*, 212 F.3d 1167 (9th Cir. 2000)
- ✓ *Singh-Kaur v. INS*, 183 F.3d 1147 (9th Cir. 1999)

✓ **Affirmed**

- ✓ *Singh v. Lynch*, 802 F.3d 972 (9th Cir. 2015) ((b) (6)); affirming a denial of relief. The IJ found the alien's testimony that he had suffered persecution on account of his membership in a sect of the Sikh faith to be not credible and denied his applications for asylum, withholding of removal, and protection under the CAT. *Id.* at 974. The IJ acknowledged that the testimony was consistent, but found it to be implausible in light of country conditions evidence. *Id.* The Circuit found that the IJ's adverse credibility determination was supported by substantial evidence. *Id.* at 977. O'SCANNLAIN. (Chief Judge THOMAS concurring in part and dissenting in part, "agree[d] with the majority that under the REAL ID Act, an Immigration Judge's adverse credibility determination may be supported exclusively by background evidence in the record," but disagreed with the adverse credibility determination with respect to the alien in this case).

Credibility/Weight of Evidence. The Circuit addressed, for the first time, "[w]hether the REAL ID Act permits . . . background documents to serve as the sole basis for an adverse credibility determination." *Id.* at 975. The Circuit reasoned that "the REAL ID Act explicitly allows the BIA and IJ to base their credibility determinations on background evidence in the record." *Id.* Accordingly, the IJ's decision in this case, which involved "considering the totality of circumstances and basing her credibility determination on the inherent implausibility of Singh's account and its inconsistency with record evidence," comported with the REAL ID Act. *Id.* at 976. Moreover, "when [an alien's] claims under the CAT are based on the same statements that the BIA determined to be not credible in the asylum context, the agency may rely upon the same credibility determination in denying both the asylum and CAT claims." *Id.* at 977 (citation and internal quotation marks omitted).

- ✓ *Singh v. Holder*, 753 F.3d 826 (9th Cir. 2014) ((b) (6)); affirming a denial of relief. The respondent reported three arrests and significant mistreatment at the hands of the Punjab police in the 1990s. He had been denied relief but in an unpublished decision, the Ninth Circuit had remanded upon its finding that he had sustained past persecution. On further remand back to the IJ, he was again denied relief. The majority finds that the presumption under 8 C.F.R. § 1208.16(b)(1)(i) "that he would be persecuted if returned to India" had been "overcome" on the basis of "a fundamental change in circumstances." 753 F.3d at 830. At the remanded hearing, the respondent again testified that the police actively continued to search for him and he presented various supportive statements from family

members as well as the village sarpanch. “The government responded by pointing out inconsistencies in Singh’s testimony and introducing documents indicating that conditions in India had changed for Sikhs who were members of supporters of groups like Akali Dal (Mann)” as this respondent had claimed. *Id.* at 829. BYBEE (Dissent by Gettleman, J., U.S. District Court Judge from Chicago, sitting by designation).

Past Persecution/Changed Conditions Found, India (2014). “Both the IJ and BIA cited the State Department’s 2008 issue paper on the treatment of Sikhs in India, which explains that ‘[t]oday, conditions for Indian Sikhs, differ dramatically from those of the 1980s and 1990s.’ *Id.* at 830. The decision reviews in some detail other particular findings, including “the State Department’s 2007 country report on human rights practices in India. The thirty-four page report is devoid of any mention of recent ongoing persecution of Sikhs” *Id.* at 831. There was also reference to asylum adjudicator materials thought Citizenship and Immigration Services. There is recognition that these materials “contain some ambiguous and inconsistent language” as to pertinent current human rights practices. *Id.* at 832.

The dissent emphasizes these conflicting statements: “These reports provided little information relevant to petitioner’s precise claim: that the police have specifically targeted him because of his past political activities and suspected support of militants, and that they continue to target him and his family.” *Id.* at 836 (Gettleman, J., dissenting). Further, these materials “are rife with hearsay-within-hearsay” and rely on unidentified sources of opinions. *Id.* at 841. The majority finds that these materials sufficed to establish “sufficiently individualized evidence of changed circumstances in the petitioner’s country of origin”; however, there must also be “an individualized determination of the petitioner’s claim for relief by assessing the impact of changed country conditions on an individualized basis.” *Id.* at 832 (majority opinion) (emphasis and internal quotations omitted). “The excerpts quoted by the agency stated that it was unlikely that an individual would be persecuted either because he is a Sikh or because he is a member or supporter of political groups like Akali Dal (Mann). For example, the IJ noted that the U.K. operational guidance note ‘states that even actual members of militant separatist groups are not likely to be able to establish persecution.’ He then applied this evidence to Singh’s particular circumstances, explaining that ‘[t]he most [Singh] claims is that police suspected him of aiding members a decade ago. But if members themselves are not subject to persecution, it makes no sense to believe that mere sympathizers are at risk of persecution.’” *Id.* (alteration in original).

Credibility/Weight of Evidence. “‘The general principle requiring the fact finder and a court of appeals to accept a petitioner’s factual contentions as true in the absence of an adverse credibility determination does not prevent us from considering the relative probative value of hearsay and non-hearsay testimony.” *Id.* at 835 (citing *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006)). The determination to afford “the affidavits [from India about asserted on going police interest in the respondent] very little weight” was upheld in that they “are completely at variance with the country conditions evidence.” *Id.* (internal quotations omitted). “There is a difference between an adverse credibility determination . . . and a decision concerning how to weigh conflicting evidence [such as] . . . the relative probative value of hearsay and non-hearsay testimony.” *Id.* at 836. It is permissible “to afford country report evidence more weight than contrary evidence . . . even though they have not made an adverse credibility determination

because there is a difference between testimony that is not credible and evidence that is not entitled to much weight.” *Id.* at 836.

- ✓ *Cheema v. Holder*, 693 F.3d 1045 (9th Cir. 2012) ((b) (6)); upholding a denial of relief with regard to an individual who explicitly conceded having “filed a fabricated asylum application that was supported by fraudulent documents. The issue in the case was whether the warning in the Form I-589 “constitute[s] sufficient notice” to impose the sanctions for having filed a frivolous I-589 under 8 U.S.C. § 1158(d)(4)(A). NGUYEN.

Asylum Application/Frivolous, Found, India (2012). The respondent testified that he read, wrote, and spoke English” and he had told the IJ at the outset of the hearing that “the application said ‘everything [he] want[ed] [the court] to know.’” Respondent claimed significant mistreatment by the Indian police. Respondent was cross-examined and raised grave inconsistencies as to his claim, by admitting that he had applied for asylum in Canada and had, in fact, obtained an Indian passport under his own name, both of which he had denied. He then “confessed that he fabricated his entire claim for asylum, including the documents supporting his application.” The court agreed with *Ribas v. Mukasey*, 545 F.3d 922 (10th Cir. 2008) that the language in the I-589 was sufficient. The respondent appears to argue that he should have received the further warning with regard to the consequences of filing a frivolous I-589 from the IJ at the outset of the hearing or when the I-589 was formally filed. The court did not accept this argument, but also noted that the respondent signed a “Record of Applicant’s Oath During Interview,” which provided a similar warning when he was interviewed before the asylum officer.

- ✓ *Latter-Singh v. Holder*, 668 F.3d 1156 (9th Cir. 2012) ((b) (6)); affirming a denial of relief. Respondent had been previously granted asylum, but never adjusted his status to become an LPR. He is a Sikh. Subsequently, he was convicted of “making threats ‘with intent to terrorize’” in violation of California Penal Code § 422. Upon being placed in proceedings, he contested the charge of removability, alien convicted of a crime involving moral turpitude. Respondent again sought asylum and related relief, as well as adjustment with a section 209(c) waiver. *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003) was cited for finding that such a conviction is categorically an aggravated felony. This reasoning was extended to find that the conviction is also categorically a crime involving moral turpitude. The decision simply does not discuss the factual basis of the I-589 claim. It affirms the administrative finding that Respondent had been convicted of a particularly serious crime and hence would not be eligible for either asylum or withholding of removal, without analysis. The decision notes that the termination of asylum status had been challenged, but again it affirms without analysis or citation. BYBEE.

CIMT/Threats. The Court distinguished *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1167 (9th Cir. 2006). It found that to have a conviction under this statute there had to be much more than “criminal threats alone.” There had to be a threat of “death or great bodily injury.” There had to be “intentional” action, unlike in *Fernandez-Ruiz* or *Uppal v. Holder*, 605 F.3d 712, 714 (9th Cir.

2010) (not finding a CIMT from a conviction under Canada's aggravated assault statute). "A conviction under § 422 requires both proof of the 'specific intent to injure' . . . as well as proof of a threat of 'death[] or serious bodily injury' made with the specific intent that the victim believe that the threat will be carried out." (at 1162.)

Waiver/209(c). The Court found that given "his conviction for a violent and dangerous crime," Latter-Singh could be held to a "higher standard" for the issuance of such. (at 1164.) Again the decision does not discuss what Singh's evidence may have been with regard to this request.

CAT/More Likely Than Not, Not Found, India (2012). This claim was simply denied because "Sikhs such as Singh are a powerful minority group in India. The current prime minister of India is a Sikh, and the record reflects that abuses by police and military have decreased in frequency and intensity." (at 1164.)

- ✓ *Singh v. Holder*, 638 F.3d 1264 (9th Cir. 2011) (b) (6); affirming a denial of relief. Respondent had unsuccessfully sought asylum in Canada prior to coming to the United States. He conceded that he made a number of false representations on his I-589 and at his asylum interview. After the case was referred to the IJ, he made corrections and pursued an entirely new claim. The new claim was heavily based on problems his father had purportedly experienced. The IJ inquired if the father would testify but was told that respondent's father was not competent to testify. There was no medical evidence to substantiate the claim, nor did relatives who lived near the father testify. KLEINFELD.

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, India (2011). "Singh argues that because the IJ found his testimony to be internally consistent . . . and consistent with his second application for asylum, the facts he swore to had to be deemed true, and the IJ was not entitled to reject his credibility because of his failure to provide corroboration." (at 1269). In rejecting this argument, the circuit found, "The burden of proof is on the asylum seeker, not the government." *See Mejia-Paiz v. INS*, 111 F.3d 720, 722 (9th Cir.1997) ("[T]he petitioner bears the burden of persuading the IJ that his evidence is credible...."). Moreover, "just because the asylum seeker does tell the story consistently, that does not establish that it is true. In this case, "Singh continued to perjure himself and present fraudulent documents even when he was safely in the United States . . . And he failed to produce any corroboration for his second story" even though supportive evidence was reasonably available through the testimony of nearby relatives. (at 1272). "Fraud in the asylum application is a 'legitimate articulable basis to question the petitioner's credibility,' and that together with past perjury and the absence of reasonably available corroboration amounts to a 'cogent reason for [the IJ's] stated disbelief.'" *See, Martinez v. Holder*, 557 F.3d 1059, 1060 (9th Cir. 2009) (quoting *Valderrama v. INS*, 260 F.3d 1083, 1085 (9th Cir.2001)).

Due Process/IJ Bias, Not Found, India (2011). The IJ commented that the father's testimony "would make no difference" and denied a request to further continue proceedings requested so that the father might be able to buttress the son's claim. In upholding the decision, the circuit found that there had not been sufficient cooperation.

- ✓ *Singh v. Holder*, 637 F.3d 1063 (9th Cir. 2011) (b) (6); affirming a denial of relief. This is a pre-Real ID Act case. This consolidated case consisted of a husband and wife who

are Sikhs and applied for asylum separately. The wife was granted asylum by the adjudicator, but the husband was not. The wife: “finally admitted that she had lied on her application and twice lied to the asylum officer.” (at 1065). There had been a number of inconsistencies in the supporting statements and personal statements. During his wife’s false testimony before the asylum officer, the husband “was present and spoke to the asylum officer, but said nothing to contradict his wife.” (at 1065). While the case was on appeal, the wife filed a motion to reopen based on an approved I-140. The Board denied the request based on the pattern of fraud perpetrated, as noted above. KOZINSKI. There was a dissent by NOONAN as to the denial of the motion to reopen.

Credibility - Pre-REAL ID/Pattern of Deception. The wife: “admits that she lied repeatedly to avoid being denied relief, and to prevent her husband from being sent back to India.” (at 1065, citing *Kaur v. Gonzalez*, 418 F.3d 1061, 1066-67 (9th Cir. 2005) (where “the asylum applicant ‘admitted in her testimony that she lied about her marital status in order to ensure the possibility that her husband could file an asylum application in the event hers was denied.’ We held that intentional deception toward the immigration authorities is ‘culpable conduct’ and one of several ‘indications of dishonesty’ that ‘cast doubt on [the applicant]’s entire story.’”). The circuit distinguished cases such as *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999), where the lie was directly related “to escaping immediate danger.”

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, India (2011). The wife: “admits that she made a conscious decision to lie to the asylum office about a fact she believed was crucial to her claim for permanent relief. It doesn’t matter that the fact turned out to be irrelevant.” (at 1066).

Motion to Reopen/Alternative Relief. The request to reopen for adjustment of status was denied because of the wife’s “history of misrepresentations ... is a serious adverse factor that is not outweighed by her positive equities.” (at 1066).

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- ✓ *Sharma v. Holder*, 633 F.3d 865 (9th Cir. 2011) ((b) (6)); upholding a denial of relief. This is not a REAL ID Act case. Respondent, who is Hindu, began encountering problems when his father “started research for a book about a Sikh separatist movement. Because Sharma’s father planned to detail police misconduct in the book, the police viewed his effort as anti-government.” (at 868). Respondent reported being detained by the police on three occasions due to the book and activities associated with his father. During one incident of detention, he suffered significant physical violence. The Board found Respondent to be credible. WALLACE. With a dissent by Thomas.

Political Opinion/Imputed, Found, India (2011). “Either the police harmed Sharma because of an imputed political opinion, or they did so, as the government argues and the Board found, solely as a means to convince his father to stop working on the Sikh book.” (at 870). The circuit applied *Sangha v. INS*, 103 F.3d 1482 (9th Cir. 1997). “The motivation of the police was clear: stop Sharma’s father from publishing his book. The police never inquired into Sharma’s own political views. When they picked him up, their sole inquiry pertained to the status of his father’s book.” (*Id.*).

Evidence/Hearsay, India (2011). Regarding testimony pertaining to ongoing threats directed at Respondent if he returned to India, “the immigration tribunals were permitted to give this

evidence less weight than the other evidence in the record.” (at 871) (citing *Gu v. Gonzalez*, 454 F.3d 1014, 1021 (9th Cir. 2006)).

Past Persecution/Family. The circuit distinguished *Silaya v. Mukasey*, 524 F.3d 1066 (9th Cir. 2008) and *Navas v. INS*, 217 F.3d 646 (9th Cir. 2000), both cases in which the respondent’s application was granted based on family members being subjected to violence. Here, it was found that there was not a sufficient nexus to a protected category: “Every time the police took Sharma to the police station they indicated that they wanted ‘to force [Sharma’s] father to divulge information and to cease his activities,’” rather than the applicant having been a surrogate for the family member that the authorities were displeased with. (at 871). The dissent noted, however that the respondent testified that, “[t]he police accused ... Sharma of being anti Govt and harassed him to prevent his father ... from working on his research.” (at 875).

CAT/More Likely Than Not, Not Found, India (2011). This claim was denied because Respondent’s father who had remained in India and stopped his work on the book, had not been harmed.

Motion to Reopen/Approval of I-130. The fact that the applicant could get status through a marriage which had been entered into after the Board’s decision was not found to require the case to be reopened. “[A]n applicant must offer evidence that is probative of the motivation for marriage, not just the bare fact of getting married,” and the evidence presented was insufficient. (at 872) (citing *Malhi v. INS*, 336 F.3d 989, 994 (9th Cir. 2003)).

✓ *Saval v. Holder*, 649 F.3d 1066 (9th Cir. 2011) ((b) (6)); The published decision was withdrawn. An unpublished disposition was entered at 2011 WL 1703987 (9th Cir. 2011), remanding the denial of relief. The circuit found that existing law did not clearly address the situation in this case where the death of a primary asylum applicant occurred while the case was on appeal from the denial of relief on a derivative beneficiary. Therefore, this case was referred to the BIA to address the issue in the first instance.

✓ *Fernandes v. Holder*, 619 F.3d 1069 (9th Cir. 2010) ((b) (6)); affirming a denial of relief to a Sikh respondent who asserted a claim of persecution based on religion and imputed political opinion. The court’s decision dealt primarily with the finding that the asylum claim was frivolous. There were two hearings before an IJ. At the first hearing, the IJ denied the claim but did not make an adverse credibility finding. The Board remanded the denial on the basis stated, thus providing “DHS an opportunity to provide additional evidence to rebut the presumption that Fernandes ha[d] a well-founded fear of future persecution.” On remand, DHS presented substantive testimonial evidence from the maker of Fernandes’ application I-589 application that it was false and that the respondent had known of such. The maker of the application had previously been convicted of manufacturing false I-589 applications. SMITH.

Remand/Scope. The respondent argued on remand that the issue of credibility was settled and thus the only issue was whether DHS could rebut the presumption. The circuit cited *Johnson v. Ashcroft*, 286 F.3d 696, 701-03 (3rd Cir. 2002) which stated “remand for consideration of a CAT claim did not limit the IJ’s jurisdiction to consider other forms of relief.”

Asylum Application/Frivolous, Found, India (2010). The respondent conceded that he had “received notice of the consequences of filing a frivolous asylum application, and that he was given the opportunity to account for discrepancies in his claim . Also, the IJ addressed the frivolous finding separately and made specific findings about the fabrication.”

- ✓ **Khan v. Holder, 584 F.3d 773 (9th Cir. 2009)** (b) (6); affirming a denial of relief on the basis that respondent “had engaged in terrorist activity.” Khan worked with Jammu Kashmir Liberation Front (JKLF). He claimed that he was affiliated only with the political wing and that his work was entirely non-violent. He admitted to knowing that he was part of a movement which was arms struggle. His work consisted of planning political activities and raising funds. He was one of the primary organizers of the political wing; he advised the political wing on how to spend its funds. Credibility was not at issue. FLETCHER, W.

Bars to Asylum/Terrorist Bar, Affirmed, India (2009). “Khan admitted that he knew that a wing of the JKLP was dedicated to armed struggle against the Indian government and that he knew that his wing was fighting the Indian Army . . . Khan had not demonstrated that he did not know and reasonably should not have known about the JKLF’s terrorist activities.” The court cited with approval the Board’s decision in *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006) with regard to an alien in this category being ineligible for relief on the basis of his solicitation of funds for a terrorist organization. The court also cited *McAllister v. Attorney General*, 444 F.3d 178 (3rd Cir. 2006), which involved such a classification for an ex-IRA activist.

Refugee Law/Treaty Obligations. The court founds that provisions of the INA trumped any treaty obligations that the U.S. might have with regard to protection of refugees in terms of this respondent’s activities. The court cited *United States v. Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989) (superseded on other grounds) and *United States v. Gonzalez-Torres*, 309 F.3d 594 (9th Cir. 2002).

- ✓ **Ahir v. Mukasey, 527 F.3d 912 (9th Cir. 2008)** (b) (6); upholding a finding of a frivolously filed asylum application. The court specifically adopted the analytical framework of *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007). WALLACE.

Asylum Application/Frivolous, Found, India (2008). The first requirement, that is to say, “notice of the consequences of filing a frivolous application” may have been met by the advisal above the signature block on the I-589. (at 917). However, it was not raised before the Board, so “we do not decide whether this notice was adequate.” (at 918). The second requirement is to make “explicit findings.” *Id.* This was met by the “inconsistencies between Ahir’s asylum applications and her adjustment application” and the lack of any adequate response. *Id.* The third requirement is that the findings be “supported by a preponderance of the evidence.” *Id.* The court did not require that there be “direct extrinsic evidence that Ahir fabricated her asylum applications” and noted that she “did not admit that she lied.” *Id.* “In Ahir’s 2001 asylum application, she stated that she had been arrested on three specific dates as a result of her membership” in a claimed women’s rights organization and that she had been physically mistreated. *Id.* “These claims are directly inconsistent with her subsequent assertion in her application for adjustment, that she had never been arrested...and with her repeated statements

that she had never been arrested anywhere in the world.” *Id.* The fourth requirement is “the applicant be given ample opportunity during his hearing to address and account...for any finding of frivolousness.” (at 919). There was no claim that Ahir had not understood the representations made in the applications or had received ineffective assistance in their preparation.

- ✓ *Goel v. Gonzales*, 490 F.3d 735 (9th Cir. 2007) ((b) (6)); affirming the denial of asylum and the motion to reopen; Goel was a member of the Nirankari religion. The asylum claim was denied for lack of credibility. While on appeal, the applicant filed a motion to reopen on the basis of a favorable polygraph exam and a medical evaluation finding that scars on the applicant’s body “may be consistent” with his claims of physical abuse on account of his religious beliefs; PER CURIA.

Evidence/Polygraph. The BIA stated its view that polygraph evidence is unreliable. The court disagreed, stating: “We do not necessarily preclude the discretionary consideration of polygraph evidence by an IJ or the BIA at earlier stages of a removal proceeding.” (at 739).

Motion to Reopen/No New Evidence. The denial of the Motion to Reopen was justified on the basis that the new evidence could have been presented at the time of hearing. Both the polygraph and the medical exam concerned events that occurred well before the asylum hearing, and since Goel was not in custody while awaiting his removal hearing, he was free to gather that evidence. Therefore, it was not previously “unavailable” as required by 8 C.F.R. § 1003.2(c)(1).

Credibility/Inconsistencies, Material, Affirmed, India (2007). There were material inconsistencies between the written record and the oral testimony at hearing in terms of the details of claimed physical assaults that went to the “heart of the claim.” (at 739) (citing with approval *Wang v. INS*, 352 F.3d 1250, 1258-59 (9th Cir. 2003)).

- ✓ *Kohli v. Gonzales*, 473 F.3d 1061 (9th Cir. 2007) ((b) (6)); affirming a denial of relief. The decision primarily deals with whether a defect in the NTA constituted a basis for termination of proceedings. The asylum claim was waived in that “Kohli admits that she is not eligible for asylum,” because the application was not timely filed. Respondent testified that while in school she became a member of a human rights organization and “particularly opposed the practices of sati and dowry” – “the former Hindu practice of a widow immolating herself on her husband’s funeral pyre.” Respondent reported having engaged in various demonstrations and activities on behalf of her beliefs. She was detained for five hours by the police and they “pushed her down into the chair.” There were reports of harassment but no further claim of physical mistreatment. CALLAHAN.

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, India (2007). The court upheld the adverse credibility determination on the basis of material inconsistencies between the I-589 and the testimony in terms of the length of the detention (in the I-589, she reported overnight, but testified that the detention was for five hours), and the extent of the “abuse,” i.e. only being pushed “Kohli’s attempt to divert blame to the person who helped her prepare her declaration

is not persuasive because Kohli is fluent in English and had no need for assistance in completing her declaration.”

Persecution/Not Rising to Level Of, India (2007). Harassment and single incident of detention does not amount to persecution.

Notice to Appear/Deficiency Of. The NTA was not legally insufficient in that the name of the issuing officer was not legible nor was there a title. The court restated the principle that “the claimant must show that he was prejudiced by the agency’s mistake,” citing *Patel v. INS*, 790 F.2d 786, 788 (9th Cir. 1986), among other cases. Kohli’s argument failed because she had not shown that the deficiency “had some impact on her rights.”

Administrative Proceedings/Presumption of Admin Regularity. “The Immigration Court’s jurisdiction is also supported by the well-established principle of federal law that administrative agencies are entitled to a presumption that they ‘act properly and according to the law.’” (citing *FCC v. Schreiber*, 381 U.S. 279, 296 (1965) and five other authorities).

- ✓ *Kaur v. Gonzales*, 418 F.3d 1061 (9th Cir. 2005) (b) (6); A Sikh Indian had her claim denied for lack of credibility due to inconsistencies in the record. These consistencies included her marital status, whether she had been raped, and the extent of her political activities. BYBEE.

Credibility/Application Prepared by Third Party. The court rejected the argument, “because [Kaur] eventually settled upon a story far less dramatic than its precursor, we must ignore her inconsistencies.” The fact that the Respondent’s first application was prepared, “by a third party” and that “the petitioner signed the application without demonstrating any awareness of its contents, the principle has little application to these facts” in that, “she was given an opportunity to clarify her testimony” prior to the hearing before the IJ. Additionally, “she repeated the version of the events outlined in her first asylum application and swore to the verity” before the asylum adjudicator.

Credibility/Inconsistencies, Material, Affirmed, India (2005). “The repeated and significant inconsistencies in Kaur’s testimony deprived her claim of the requisite ‘ring of truth’” or in other words, “the truth in this case has been a moving target.”

Credibility/REAL ID Standard. In dictum, the court notes, “our review of IJ ‘adverse credibility findings’ is significantly restricted.”

- ✓ *Singh v. Ashcroft*, 367 F.3d 1139 (9th Cir. 2004) (b) (6); upholding adverse credibility determination; petition denied; RYMER; (HAWKINS, dissenting, urged remanding the transcript for clarification).

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, India (2004). Alien’s testimony that he was in hiding for five years was inconsistent with testimony that he was in charge of family farm, alien had date of arrest wrong on asylum application, alien testified that he was political leader at a time when country report indicated that leader was in custody, alien knew little about political party he claimed to be part of and could not articulate work he did for group, and alien did not participate in elections even though establishing separate state through electoral process was objective of alleged political activity.

Credibility/Translation. “Given the numerous specific points on which the IJ found Singh’s testimony not credible, including testimony that was neither confusing nor unintelligible, we cannot conclude that a better translation would have made any difference in the hearing’s outcome.” (at 1144).

✓ *Singh v. Ashcroft*, 361 F.3d 1152 (9th Cir. 2004) (b) (6)); upholding BIA’s dismissal of alien’s appeal based solely on procedural grounds—failure to timely file appeal brief with the BIA; petition denied; TALLMAN; *distinguished by Garcia-Cortez v. Ashcroft*, 366 F.3d 749 (9th Cir. 2004).

✓ *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004) (b) (6)); upholding denial of asylum and withholding, but remanding for determination of adjustment of status upon finding alien qualified under CSPA; REINHARDT.

Persecution/Not Rising to Level Of, India (2004). Alien’s testimony that two separate and unrelated groups of restaurant patrons initiated fights with his family—fights that did not result in any physical harm—and that during the second incident a threat was made against him and his father, fell short of the showing necessary to compel a finding of persecution; evidence and record also fell short of establishing that applicant had a well-founded fear of future persecution if he was returned to India, particularly in light of State Department country report making it clear that government of India did not systematically discriminate against Muslims on grounds of race and religion.

Nexus/Motive Not Found, Pre REAL ID (2004). Alien did not establish that he would either be forced into military service or singled out for persecution by military officials during such service on account of his religion or any other statutorily-protected ground.

✓ *Singh v. Ashcroft*, 351 F.3d 435 (9th Cir. 2003); affirming denial of habeas corpus challenge to BIA’s denial of CAT; MATZ.³⁰

CAT/More Likely Than Not, Not Found, India (2003); Persecution/Of Family, Affirmed, India (2003). BIA’s determination that alien was not likely to be tortured if removed to India was supported by substantial evidence that, although alien’s father had been threatened by his mother’s family, who are police officers in India, alien had not been tortured in past, his mother’s family members had not threatened him, and alien was not likely to be tortured if he settled somewhere other than his hometown.

Bars to Asylum/Particularly Serious Crime, Found, India (2003). Assault with a weapon likely to produce great bodily harm found to be particularly serious crime, even when Respondent

³⁰ In *Wang v. Holder*, 583 F.3d 86 (2d Cir. 2009), the circuit construed the statutory bar to asylum and withholding of removal under 8 U.S.C. § 1231(b)(3). The circuit noted that “there are serious reasons to believe the alien committed a serious non-political crime” before coming to the U.S. Although the respondent claimed that he had no choice but to engage in the illegal scheme to steal organs of the deceased, the court upheld a denial of relief.

only conceded having “kicked” victim. Not eligible for asylum and withholding. See *Kamarenko v. INS*, 35 F.3d 432 (9th Cir. 1994); *Matter of B-*, 20 I&N Dec. 42 (BIA 1991).

- ✓ *Malhi v. INS*, 336 F.3d 989 (9th Cir. 2003) (b) (6); upholding adverse credibility determination; petition denied; CLIFTON.

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, India (2003); Discrepancy, Spelling of Name. Geographic discrepancies which went to the heart of asylum applicant’s claim of being persecuted in Punjab for being a member of AISSF, a dissident political organization in India, constituted sufficiently specific, cogent reasons for adverse credibility finding. A myriad of other inconsistencies were noted by the IJ and BIA, including the use of a false name in the asylum application.

Credibility/Corroboration Required. “Only one of the several affidavits he submitted attested to Malhi being arrested, that being the one from his father, and at best it only partially corroborated Malhi’s version of events. Accordingly, given the lack of corroborating evidence, we cannot say that we are compelled to believe Malhi’s story.” (at 993).

Well-Founded Fear/Nationwide Danger. Membership in AISSF does not establish a well-founded fear of persecution because, according to the State Department report, membership in organization alone would not pose a nationwide danger.

- ✓ *Singh-Kaur v. INS*, 183 F.3d 1147 (9th Cir. 1999) (b) (6); upholding adverse credibility determination; petition denied; GRABER; (HAWKINS, dissenting, argues that at no point in the proceeding did the IJ advise Petitioner that his identity was in issue).

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed (1999); Discrepancy, Spelling of Name. Substantial evidence supported credibility determinations by IJ adverse to asylum applicant claiming he was persecuted because he protested against police treatment of Sikhs while he served as elected village leader in India; IJ stated that applicant literally jumped around in his seat when being cross examined, record reflected inconsistencies in applicant’s testimony, record indicated that during course of proceedings applicant suddenly started using a name that appeared in newspaper articles describing incidents to which he testified, and IJ stated that virtually all details in applicant’s testimony also appeared in newspaper article.

Credibility - Pre-REAL ID/Demeanor. Court of Appeals gives special deference to a credibility determination of an IJ based on demeanor. “Certainly most witnesses are uncomfortable and nervous when being cross-examined and, perhaps, when being questioned by a judge. Nonetheless, we find no reason to discount the IJ’s reliance on Petitioner’s demeanor here. As a judge, she has observed many people in Petitioner’s position, and we defer to her ability to differentiate between the usual level of anxiety and Petitioner’s behavior, for example, ‘literally jump[ing] around in his seat.’” (at 1152).

✕ *Not Affirmed*

- ✱ ***Singh v. Holder*, 764 F.3d 1153 (9th Cir. 2014)** (b) (6); reversing and remanding a denial of relief. The respondent is a Sikh. He reported significant physical abuse at the hands of the Punjab police because they wrongly thought he was assisting “terrorists.” *Id.* at 1157. Respondent was found to have been credible. Relief was denied in that under the REAL ID Act, he “had not established that an imputed political opinion was a central reason for his persecution by the Punjab police.” *Id.* at 1158. Further, “the Indian government had a legitimate reason to arrest, detain, and question Singh.” *Id.* (internal quotation marks omitted). The respondent had been granted relief under CAT. REINHARDT. There was a dissent by GEORGE (senior district court judge sitting by designation).

Nexus/Central Reason, Post REAL ID, Not Affirmed, India (2014). “The Punjabi police attributed a political opinion to Singh during their interrogation and abuse of him. Testimony regarding a persecutor’s statements serves as direct evidence that the persecution was motivated by a political opinion imputed to the applicant.” *Id.* at 1159 (citation omitted). Further, “[a]n ‘applicant’s association with, or relationship to, people who are known to hold a particular political opinion’ may serve as indirect evidence of an imputed political opinion.” *Id.* at 1159 (quoting *Garcia-Milian v. Holder*, 755 F.3d 1026 (9th Cir. 2014)). “The Punjabi police asserted that Singh was a ‘traitor’ based solely on his association with Khan, a reason we have repeatedly held to support the conclusion that a political opinion has been imputed to the applicant.” *Id.* at 1159-60 (citing *Silaya v. Mukasey*, 524 F.3d 1066, 1070-72 (9th Cir. 2008)). While acknowledging that the REAL ID Act “eliminate[d] the presumption previously applied by [the Circuit] that persecution is politically motivated in the absence of any evidence of a legitimate prosecutorial purpose . . . an applicant must now introduce evidence to demonstrate that he was wrongly accused of being a terrorist instead of relying on the presumption that he was persecuted on account of a political opinion when no evidence as to motive is presented.” *Id.* at 1160-61. This was found by his testimony. The dissent asserted that the evidence was explicit from the respondent’s testimony that he “was only arrested because of Javed Khan and they said he was a terrorist and police alleged that [the respondent] was helping the terrorists” and that such should have been deemed inadequate. *Id.* at 1164 (George, J., dissenting).

- ✱ ***Kumar v. Holder*, 728 F.3d 993 (9th Cir. 2013)**; reversing and remanding a denial of asylum for alien who had been found ineligible for asylum as a “persecutor” under 8 USC § 1101(a)(42). Credibility was not at issue. Mr. Kumar had served for a number of years as a police officer, “staff for an intelligence agency,” and had been briefly promoted to “head constable” on behalf of the Punjab police. In 1993, he had become aware of misconduct by others in the police force. He tried to alert superiors as to this misconduct and was “threatened,” but never experienced any actual physical violence. He denied that he had ever personally treating a prisoner inappropriately. He fled India later that year to apply for asylum and related relief. The persecutor bar was applied based on a finding that Respondent had served as an armed guard for a number of years, worked in other security positions as a result of promotion, and that his services had been an important part of the process under which these organizations had mistreated people. NOONAN

Bars to Asylum/Persecutor Bar, Not Found, India (2013). The Board relied on *Miranda-Alvarado v. Gonzales*, 449 F.3d 915 (9th Cir. 2006) to justify its position. The Circuit held that the Board had “misconstrued” its holding in that case, which established requirements for analyzing the applicability of the persecutor bar. First, was Kumar’s personal involvement in the mistreatment active or passive? The Circuit held that Kumar “was not actively involved in the persecutive acts.” 728 F.3d at 999. Second, were his acts “material to the persecutory end, . . . measured by examining the degree of relation his acts had to the persecution itself: How instrumental to the persecutory end were those acts?” *Id.* (quoting *Miranda-Alvarado*, 449 F.3d at 928). The BIA held that Kumar’s work was work as a constable “was integral to the security of the [intelligence facility], and therefore, to its functioning.” *Id.* However, the Circuit clarified that “for the integral participation requirement to be met, a prison employee’s work must be integral to the persecution that occurred. An employee’s work may be integral to a prison facility but not to the persecution that occurs within it,” citing cooks and plumbers as examples of integral work that is not integral to persecution. *Id.* The Circuit rejected the BIA’s reliance on *Federenko v. United States*, 449 U.S. 490 (1981) (upholding the denaturalization of a prison guard who worked at a Nazi concentration camp), instead clarifying that “a legitimate arm of a recognized government differs materially from that analysis when applied to an alien who served as a Nazi concentration camp guard” and relying on *Diaz-Zanatta v. Holder*, 558 F.3d 450, 452 (6th Cir. 2009). *Id.* Finally, “the BIA misapplied *Miranda Alvarado*’s requirement of evaluating extenuating circumstances” and relied on a “hypothetical [that] should not function as a legal argument.” *Id.* at 1000. It should not have relied upon Kumar’s admission that “he would have continued to guard the intelligence agency had he not been transferred,” but should have “evaluate[d] the particular behavior that actually occurred” and acknowledged that “the very reason Kumar was transferred from his position from the agency lay in his repeated decisions to speak up.” *Id.*

- * *Nijjar v. Holder*, 689 F.3d 1077 (9th Cir. 2012) ((b) (6)); remanding an order of removal. The Respondent had been granted asylum by then-INS. DHS then terminated asylee status on the basis of fraud and initiated removal proceedings. The Board upheld IJ’s determination that she did not have jurisdiction to review the termination of status. KLEINFELD.

Asylum Application/Termination of Asylee Status. “Congress has provided one way for asylum status to terminate: through the Attorney General. There is no statutory authorization for a second way. The regulations pursuant to which the Department of Homeland Security terminates asylum status, 8 C.F.R. § 208.24(a) and 8 C.F.R. § 1208.24(a), are ultra vires because the governing statute, 8 U.S.C. § 1158(c)(2), confers that authority exclusively on the Attorney General.” At 1085-86.

- * *Singh v. Holder*, 656 F.3d 1047 (9th Cir. 2011) ((b) (6)); remanding a denial of asylum based on the finding of an untimely I-589. Respondent had been granted withholding of removal based on past persecution. Respondent came into this country on Aug. 26, 1999, with authority ultimately being extended to remain under Aug. 24, 2000. The I-589 was filed on Nov. 20, 2000. Credibility was not at issue. THOMAS

Bars to Asylum/One Year Bar, Not Found, India (2011). The court found that the asserted arrest of the respondent's wife in Sept. 2000 constituted a basis to find a "changed circumstance" to justify the delay. Additionally, the Circuit rejects the Board's effort to justify its finding that there had been a non-timely filing. Although there was a successful request to extend the time of the visitor visa so that he would be in lawful non-immigrant status, such was not accepted by the Board because it was not directly related to the filing of the I-589; and that he had unreasonably delayed the filing of the I-589 for seven months after the expiration of the first visa extension and three months after expiration of the second. In other words, the court was willing to accept the extension of legal status for any reason so as to only then commence the time period to see if the filing had been done in a reasonable time after the expiration of legal status.

- ✱ *Singh v. Holder*, 649 F.3d 1161 (9th Cir. 2011) (*en banc*) (b) (6)); remanding a denial of relief. This is a typical Sikh asylum claim. The IJ made no adverse credibility determination but found the claim was untimely. The issue before the court was whether under the REAL ID Act, "the BIA improperly imported the corroboration requirement of [U.S.C.] §1158(b)(1)(B)(ii) (governing demonstration of *refugee status*) into §158(a)(2)(B) (requiring applications to be timely filed)." (at 1163.) (emphasis in original). McKEOWN. There was a dissent by O'SCANNLAIN.

Bars to Asylum/One Year Bar, Not Found, India (2011). "Until the passage of the REAL ID Act, it was the law of this circuit that corroboration of an asylum applicant's credible testimony with respect to refugee status could not be required. With the REAL ID Act, Congress abrogated our case law by adding to the INA, three new, independent corroboration provisions" but not one for demonstrating a timely filed application. (at 1165.) The Court remanded the case to determine "whether Singh's credible testimony unaided by corroborative evidence demonstrated by clear and convincing evidence that Singh's application was timely." (at 1169.)

- ✱ *Vahora v. Holder*, 641 F.3d 1038 (9th Cir. 2011) (b) (6)); remanding a denial of asylum based on an untimely I-589. Credibility was not an issue. The alien was a Muslim who reported a series of problems from Hindus in his village. He left India in 2000, and entered the United States on April 5, 2001. Respondent applied for asylum on December 16, 2002. The petition for review was granted under 8 USC 1158(a)(2)(D), based on a demonstration of "changed circumstances which materially affect the applicant's eligibility for asylum." (at 1042). Although the case was remanded, the circuit characterized the delay in filing as "eminently reasonable." (at 1048). TIMLIN, District Court Judge sitting by assignment. There was a strong dissent by KOZINSKI: "The majority makes mincemeat of the one-year filing requirement." (at 1048). Further: "with one swift blow, the majority pretty much knocks out the one-year filing deadline for asylum claims, showing once again that no statute, no matter how clear, is safe from usurpation by judges willing to engage in creative interpretation." (at 1051).

Changed Country Conditions/Changed Conditions Found, India (2011). Respondent “testified at the asylum hearing that he was not thinking of seeking asylum when he entered the United States, but that changed in February 2002.” (at 1041). Over the months following, arson was committed against his family’s property in the village, police action was taken against his brother who remained there, and there was intense local violence between Hindus and Muslims. The circuit characterized the administrative position as being based on the fact that “Vahora had already experienced mistreatment in India and should have expected it would continue if he returned.” (at 1044). This “interpretation of ‘changed circumstances’ is that once an applicant for asylum has experienced circumstances that arguably would establish a colorable claim for asylum within the statutory time period for filing, that applicant must file his application timely, or be permanently barred from doing so.” (*Id.*). Or, that “prior to the change in circumstances, the applicant could not have filed a meritorious application.” (*Id.*). In rejecting this interpretation, the circuit cited *Fakhry v. Mukasey*, 524 F.3d 1057, 1063 (9th Cir. 2008). “[T]here can be ‘changed circumstances which materially affect the applicant’s eligibility for asylum’ even if the alien always meant to apply for asylum and always feared persecution.” (*Id.*). The circuit characterized the legislative intent for this exception to be broad.

- ✱ *Chawla v. Holder*, 599 F.3d 998 (9th Cir. 2010) (b) (6)); reversing a denial of relief on credibility grounds in a typical Sikh asylum claim involving advocacy against the government, significant physical mistreatment, detention, and release after payment of a bribe. The decision did not apply the REAL ID Act or speak to its applicability. The IJ had continued the individual hearing over three hearings in an apparent effort to allow the respondent to submit further evidence and to respond to his credibility concerns. The IJ articulated six reasons for finding the respondent not credible. The BIA articulated four additional reasons for not finding the respondent credible. In a 24-page decision, the Ninth Circuit rejected each of the reasons. The circuit found that some of the allegedly inconsistent submissions were in fact “not wholly inconsistent,” that the respondent provided “reasonable explanations” for some of the inconsistencies, and that the IJ’s conclusion that certain assertions were inherently unbelievable were “speculation and conjecture.” TROTT.

Credibility - Pre-REAL ID/Corroboration Not Required, India (2010); Evidence/Corroboration Not Required, India (2010). Because the IJ found respondent incredible he demanded corroborative evidence. The court held that such can only be required when “the requested evidence is ‘non-duplicative, material, and easily available,’” citing *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000).

Credibility - Pre-REAL ID/Implausibility, Not Affirmed, India (2010); IJ Speculation, Not Affirmed, India (2010). In finding that the Board engaged in impermissible speculation, the court rejected the Board’s consideration that a key piece of evidence was “poorly drafted and formatted” as well as the Board’s idea of “what someone in Chawla’s position would or would not do.” Similarly, the circuit rejected the Board’s reliance on the absence of any “media report” of the alleged bus explosion that the respondent claimed had prompted the police to detain and assault him, as “neither the IJ nor the BIA point to any evidence in the record that such reports exist.” The circuit also rejected the notion that it was “inherently unworthy of belief that the

local police would still be interested in Chawla after almost 6 years simply because Chawla was communicating with his father by phone from the U.S.”

Credibility - Pre-REAL ID/Entry into U.S. The respondent obtained a visa to enter the U.S. as a visitor. The IJ found the respondent’s version of what he said to be granted the visa to be “inherently unworthy of belief.” The circuit did not accept this conclusion.

Credibility - Pre-REAL ID/State Department Reports, Reliance On Rejected, India (2010); Past Persecution/Country Reports, Use Of Rejected, India (2010); Country Reports/To Rebut Past Persecution, Insufficient, India (2010). The IJ suggested that the respondent could reasonably be expected to relocate to living in New Delhi, noting that “there is nothing in the background information that suggests that the Sikh community in New Delhi is suffering persecution at this particular time.” The circuit rejected this conclusion.

- * *Kaur v. Holder*, 561 F.3d 957 (9th Cir. 2009) (b) (6); reversing and remanding a denial of relief for a second time in another published decision. In the first decision, *Cheema v. Ashcroft*, 383 F.3d 848 (9th Cir. 2004), the court found “there is no evidence that Kaur engaged in terrorist activity and remanded “for the AG to exercise his discretion as to the asylum claim.” In denying asylum in the exercise of discretion, the government relied on “evidence classified as secret” that Kaur “had not been completely candid before the IJ”, and that she had engaged in “immigration fraud” by paying money to get her nephew into the U.S. and attempting to smuggle her daughter as well. McKEOWN.

Due Process/Reliance on Secret Evidence. The court held that the summary of the classified evidence provided to respondent was “simply insufficient to meet the requirement in 8 C.F.R. § 1240.33(c)(4) requiring that it be as ‘detailed as possible’ to allow Kaur an opportunity to offer opposing evidence” and that it otherwise contravened her due process rights.

Discretion/Administrative Exercise Of, Not Upheld, India (2009). “The BIA may not use an unspecified ‘lack of candor’ reference to buttress a discretionary denial of asylum,” citing to *Kalubi v. Ashcroft*, 364 F.3d 1134 (9th Cir. 2004).

- * *Singh v. Gonzales*, 491 F.3d 1019 (9th Cir. 2007) (b) (6); reversing and remanding a denial of asylum; A Sikh asserted a claim based on being mistreated over support for Sikh rights. The IJ drew an adverse inference from Singh’s refusal to allow access to a Canadian immigration file under his name. Without Singh’s signed consent, Canada would not release the information. The respondent refused to sign the request on the basis that if he did so, his family remaining in India might be at risk. In a forceful dissent, Judge Rawlison argued: “We should not reward those who deliberately thwart the administrative processes we have established to assess eligibility for asylum.” (1029); HENDERSON (district court judge); Strong dissent by RAWLINSON.

Evidence/Corroboration Not Required, India (2007); Negative Inference; Credibility - Pre-REAL ID/Explicit Finding Required, India (2007). “The IJ noted that Singh had submitted no documents in support of his asylum application confirming his identity, and that corroborating evidence from Canadian immigration records might support his claim.” *Id.* at 1022. “[T]he IJ denied Singh’s application solely on the basis of the negative inference he drew from Singh’s

refusal to release the Canadian records.” *Id.* at 1024. While the court would permit the IJ to draw a negative inference from the fact that Singh withheld evidence, there was no “explicit credibility finding,” and hence the IJ must accept the witness’s testimony as true. *Id.* at 1025. “[T]he BIA may not require independent corroborative evidence from an asylum applicant who testifies credibly in support of his application.” *Id.* at 1025. “The IJ’s broad use of the ‘negative inference’ was therefore the functional equivalent of demanding corroborating evidence.” *Id.* The court extensively cited and relied upon the cases of *Kataria v. INS*, 232 F.3d 1107 (9th Cir. 2000), and *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000).³¹

- ✕ *Kumar v. Gonzales*, 444 F.3d 1043 (9th Cir. 2006) (b) (6); reversing and remanding a denial of relief on the bases of an adverse credibility finding and a determination that the mistreatment imposed was not on account of one of the protected criteria; The petitioner claimed that he was a citizen of India from Jammu and Kashmir who was significantly physically mistreated by the Indian police who thought he was assisting a “militant.” He himself was a “law-abiding citizen with no political contact.” The respondent’s parents continued to live in the home area without incident. The IJ had found that the petitioner’s claim inconsistent with country conditions, inherently unbelievable, the mistreatment not “on account of” one of the protected criteria, and marked by outright fraud. The panel’s factual summary of the claim was taken from the respondent’s “sworn declaration.” This was done notwithstanding the respondent’s lack of fluency in English and that the “application contains numerous spelling and grammatical errors which suggest that [the preparer] was generally careless...or was otherwise unqualified or incompetent.” The panel found the respondent to be “credible.” REINHARDT (strong dissent by KOZINSKI).

Credibility/IJ Speculation, Not Affirmed, India (2006). The IJ’s finding from his visual examination of certain of the supporting documents as to what he felt were self-evident forgeries was rejected as “speculation.” The majority suggested that it would be far more preferable “prior to rejecting documentary evidence” for IJ’s to “consult experts.” The fact that there were photographs of asserted trauma that in fact portrayed the respondent’s brother, which was also used to support the finding, was rejected as “clerical error.”

Country Reports/To Support Claim, Sufficient, India (2006). The majority cited to “country reports” which “stated... that India was the site of significant civil rights abuses stemming from ‘deficient police methods and training’ as well as ‘violent secessionist movements’ responsible for ‘extrajudicial executions and other political killings, torture, and brutality.’”

Political Opinion/Imputed, Found, India (2006). “We have repeatedly held that an applicant can establish imputed political opinion based upon the persecutor’s erroneous belief as to the applicant’s political affiliation or opinion.”

³¹ *Kumar v. Holder*, 2010 WL 510622 (9th Cir. 2010) is an unpublished decision that is discussed by Board member Grant in an article published in the March 2010 edition of the Immigration Law Advisor. The decision was decided under the REAL ID Act. The respondent had previously had an asylum claim rejected in Canada and subsequently pursued an asylum application in the U.S. The circuit reversed the adverse credibility determination. Moreover, the circuit rejected the finding that the alien had failed to meet the corroboration requirement notwithstanding that the IJ felt it “highly relevant” to have the decision and application “as a check on Kumar’s credibility.”

CAT/Torture, Not Found, India (2006). The panel upheld the denial of CAT relief. This was so notwithstanding the panel having found that the respondent had “endured a month-long detention and serious physical abuse” as well as having received a letter from his parents “that the local police... would kill him if he returns to India.”

Dissent. After reviewing a number of Ninth Circuit precedents, Judge Kozinski expressed his agreement with Judge O’Scannlain’s statement in *Jabril v. Gonzales*, 423 F.3d 1129, 1138 (9th Cir. 2005) about “our often irreconcilable precedents.” He went on to further comment: “any asylum applicant who is a skillful enough liar - and many who aren’t - must be believed no matter how implausible or far-fetched their story” and “IJ’s who are doubtlessly chary of being vilified by August court of appeals judges, become even more reluctant to make adverse credibility findings, even when they have good reason to believe the asylum applicant is lying.”

- * *Singh v. Gonzales*, 439 F.3d 1100 (9th Cir. 2006) (b) (6); reversing adverse credibility finding and remanding. The denial of relief under CAT was sustained. In 1996, a non-political non-baptized Sikh transported a group of demonstrators for “an independent Sikh state.” He claims to have been arrested as a result thereof and significantly mistreated. In January of 1997, he claims that the police warned his father that “he would not be spared” if he again transported “protestors.” ALARCON.

Credibility/IJ Speculation, Not Affirmed, India (2006); Corroboration Not Required, India (2006). Although the IJ identified a series of inconsistencies in the record they were found to not be “sufficient” - such as “who paid the bribe” to secure his release or if the respondent had transported “demonstrators” “many times” or “only once or twice.” The IJ had found the respondent’s testimony to be “extremely general.” The assertions made to support the assessment were rejected as impermissible “speculation” by the IJ. The effort to justify the finding on the basis of failure to present proper corroborating documentation was also rejected. “Supporting documentation is only required when the applicant’s testimony alone is insufficient to support the claim.” *Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000). The court found that his testimony alone was sufficient.

Bars to Asylum/Safe Third Country. The court cited *Ding v. Ashcroft*, 387 F.3d 1131, 1139-70 (9th Cir. 2004) for not accepting a denial of a claim or a finding of incredibility based on failure to seek asylum in the country that the respondent was legally residing in during the course of a “seven month visa.”

Identity/Identification Documents. The IJ had found the respondent not to have adequately established his identity. She based her decision on a portion of the Department of State Foreign Affairs Manual which was not in the record. This was found to be improper “speculation.” The court labeled the mistranslated birth certificate as “irregular.” It cited to *Yeimane-Berhe*, 393 F.3d 907, 911 (9th Cir. 2004) where even a fraudulent document that “goes to the heart of the claim” cannot be used to justify an adverse credibility finding unless it can be demonstrated that the applicant knew of the falsity.

Credibility/State Department Reports, Reliance On Rejected, India (2006). The IJ denied relief on finding that the transport of the demonstrators on the one or two occasions as finally claimed was not consistent with such in the record given the sharp “reduction in militant Sikh terrorism as a result of an antiterrorism campaign in 1991-92.” The court cited to *Zheng v. Ashcroft*, 397

F.3d 1139, 1143-44 (9th Cir. 2005) for “general descriptions of the State Dept.’s report to find Mr. Singh’s testimony implausible and incredible was thus improper.”

Nexus/Mixed Motive, Pre REAL ID, India (2006). “The fact that the police may have acted pursuant to an anti-terrorism law would not necessarily rule out a statutory protected motive,” citing to *Zhang v. Ashcroft*, 388 F.3d 713, 719-21 (9th Cir. 2004) (relating to the unauthorized practice of Falun Gong).

CAT/Internal Relocation, Not Affirmed, India (2006). Although the court remanded for consideration of the asylum and withholding of removal claims it upheld the denial of CAT. The court did not cite any facts to support that conclusion. The court did comment: “Mr. Singh bears the burden of proving he ‘would be unable to live elsewhere in the country safely.” *Hassan v. Ashcroft*, 380 F.3d 1114, 1123 (9th Cir. 2004) (petitioner feared mistreatment as retaliation for criticism of local politicians but did not produce evidence of his inability to escape mistreatment by internally relocating. The Hasan court had found that the denial of asylum /withholding of removal based on the reasonableness of internal relocation could not stand but it affirmed the denial of CAT on that theory given what it found to be the respondent’s higher burden of proof). “If Mr. Singh’s fear is based on the mistaken belief of police in a certain area, he would presumably be safe in another area of India where the police do not take him for a separatist. The record contains no evidence that simply being an apolitical Sikh would cause police to torture Mr. Singh if they do not believe he is a separatist.”

✱ *Bhasin v. Gonzales*, 423 F.3d 977 (9th Cir. 2005) (b) (6); reversing a denial of a motion to reopen following the dismissal of an appeal denying the applications for asylum and withholding of removal. The alien’s son served as “a government inspector in the Border Security Force” where he had been involved in the apprehension of a terrorist leader. “Several members of her family had already disappeared and she claims that this persecution is on account of membership in her familial social group.” She asserted that she had been subjected to having been kidnaped, physical violence, and threatened. The IJ denied relief on the basis that the future fear and prior actions had been prompted by “the actions taken by her son...in the arrest of [terrorist] leadership.” Notwithstanding the Board’s dismissal of affidavits as “self-serving,” the court restated the principle from *Loadha v. INS*, 215 F.3d 889, 905 (9th Cir. 2000), that, “the exclusion of self-serving documents is not sound practice”; the court found that the alien had established a prima facie basis for relief.

✱ *Singh v. Gonzales*, 403 F.3d 1081 (9th Cir. 2005) (b) (6); reversing IJ’s adverse credibility decision (Board aff’d without opinion) and remanding; Sikh applicant asserted past persecution at the hands of the Indian police as a result of his advocacy for the Sikh homeland of Khalistan. The IJ found him not credible on four bases: 1) omission of details concerning his first arrest that were recounted in a supportive affidavit from his father; 2) discrepancies between dates of arrests reported to the asylum adjudicator and those in his testimony; 3) inconsistency between alien’s asserted role in the 1992 election boycott and that stated in his father’s affidavit; and 4) inconsistency between his father’s affidavit and alien’s testimony as to when his last arrest took place. Additionally, relief was denied in the alternative due to changed country conditions, a ground not addressed by the court.

BERZON; (Judge Leavy, concurring in the result, criticized the majority for “fact finding” by referring to non-record materials that were utilized to suggest that the failure to recall specific dates is not an appropriate basis to justify an adverse credibility finding).³²

Credibility - Pre-REAL ID/Detail, Lack Of (2005); Discrepancy, Dates. “The ability to recall precise dates of events years after they happen is an extremely poor test of how truthful a witness’s substantive account is.” (at 1090-91). “[T]he mere omission of details is insufficient to uphold an adverse credibility finding.” *Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 2000). Because all of the written evidence must be considered by the IJ, see *Ochave v. INS*, 254 F.3d 859, 865 (9th Cir. 2001), the omissions were merely “peripheral details that he had already provided.” (at 1085). The court again relied on *Bandari*, 227 F.3d at 1166 for the rule: “we have frequently characterized discrepancies in dates which reveal nothing about an asylum applicant’s fear of his safety to be minor inconsistencies that cannot form the basis of an adverse credibility finding.” (at 1087).

Assessment to Refer/Reliance On. The Assessment to Refer was not deemed as “reliable” when the asylum adjudicator who authored the same did not testify. The court noted its concern regarding over-reliance on hearsay in the assessment’s summary of the respondent’s testimony, citing to, among other cases, *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997). The court further compared the asylum adjudicator’s interview to an “airport interview” and stated the standards outlined in *Li v. Ashcroft*, 378 F.3d 959, 962-63 (9th Cir. 2004), must be met before such could be accepted as “reliable.” Additionally, the assessment does “not contain any record of the questions and answers” nor a “transcript” and hence is not “substantial record evidence.” (at 1089).³³

✱ *Singh v. Ashcroft*, 393 F.3d 903 (9th Cir. 2004) ((b) (6)); reversing BIA’s adverse credibility determination and remanding; NOONAN.

Credibility/Corroboration Not Required, India (2004). Alien’s lack of corroborating evidence of the existence of the Research and Analysis Wing (RAW), an intelligence office of the Indian government, could not be grounds for finding alien not credible.

Administrative Proceedings/Judicial Notice. Judicial notice is appropriate “to ensure that administrative or judicial ignorance is not insulated from review through hyper-technical application of the general rule that the court can consider only evidence considered by the Board.” The court was free to conduct a Lexis search of reputable international media sources to substantiate alien’s claim of the existence of RAW. (at 906-7).

³² In *Koulibaly v. Mukasey*, 541 F.3d 613 (6th Cir. 2008), the court approved of this holding in rejecting as “unreliable” the asylum adjudicator’s assessment to refer an asylum case and adverse credibility determination even when contemporaneous notes of the interview were offered.

³³ In *Matter of S-S-*, 21 I&N Dec. 121, 124 (BIA 1999), the Board held that in order to support an adverse credibility determination from an administrative record, it “needs to know what transpired in the proceedings before the asylum officer before we can evaluate questions with respect to credibility arising from the interview.”

- ✱ *Kaur v. Ashcroft*, 388 F.3d 734 (9th Cir. 2004) ((b) (6)); remanding with instructions to allow asylum applicant's son to testify; GRABER.

Evidence/Testimony, Exclusion Of, India (2004). Although alien's son was relatively young at the time the relevant events occurred, it should not have prevented him from testifying, in the absence of an inquiry by the IJ into son's ability to perceive, recall, and recount the events.

Evidence/Child Testimony . Despite alien's admission that her earlier asylum application was false and that she had lied to the asylum officer during the interview, the IJ could not make an adverse credibility determination without hearing testimony from alien's son, even though he was relatively young at the time the events occurred.

- ✱ *Cheema v. Ashcroft*, 383 F.3d 848 (9th Cir. 2004) (*amending and superceding* 372 F.3d 1147 and 350 F.3d 1035) ((b) (6)); granting CAT and withholding to wife; remanding consideration of wife's asylum application to BIA; remanding statutory withholding and asylum applications of husband to BIA; denying withholding under CAT to husband; affirming grant of deferral under CAT for husband; NOONAN; (RAWLINSON, dissenting, found that the couple had provided material support to major international terrorists and that they threaten the security of the U.S. "Car bombings, assassinations of government officials, massacres – world wars have begun with less impetus.").

Summary. (1) Wife's sending money to aid Sikh widows and orphans, without more, did not constitute terrorist activity for purpose of bar to withholding of deportation; (2) husband's activities of raising money that reached Sikh resistance organizations in India and having phone conversations with Sikh terrorists constituted terrorist activity; (3) however, terrorist activity affecting India must have endangered U.S. security to support bar.

CAT/More Likely Than Not, Found, India (2004). Husband demonstrated probability of harm sufficient for eligibility for relief under CAT based on being brutally tortured by Indian authorities and that he "is one of the few prominent pro-Khalistan leaders in the world who would be in danger if returned to India." Wife would also more likely than not be tortured if returned to India. (at 853).

Bars to Asylum/Terrorist Bar, Not Affirmed, India (2004). Wife's activities in sending money to aid Sikh widows and orphans did not constitute terrorist activity, and thus could not support a bar from the relief of asylum or withholding of deportation; evidence did not establish link between donations and Sikh terrorist organizations, absent showing that widows or orphans were engaged in terrorism, had committed or were planning to commit terrorist acts, or were conduits to terrorist organizations.

Bars to Asylum/Terrorist Bar, Not Affirmed, India (2004). Substantial evidence that husband raised money that reached Sikh resistance organizations in India, and that alien had telephone conversations with Sikh militants known to engage in terrorist activities, supported determination that husband engaged in terrorist activity; however, no link between the alien's acts of terrorism in India and the endangering of lives, property or welfare of U.S. citizens was demonstrated. Remanded to BIA for decision on discretionary issue of whether husband's terrorist activity endangered U.S. security.

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- ✱ *Kaur v. Ashcroft*, 379 F.3d 876 (9th Cir. 2004) ((b) (6)); reversing IJ's adverse credibility determination and remanding; W.FLETCHER; (TALLMAN, dissenting, disagreed with the majority's divide-and-conquer approach to undermine the adverse finding, and finding that the IJ's articulated reasons were sufficiently cogent and substantial).

Credibility - Pre-REAL ID/Discrepancy, Spelling of Name. IJ's adverse finding on credibility of asylum applicant, to extent based upon discrepancy between manner in which applicant spelled her name and spelling of name on Indian passport or upon manner in which signature sheet was embossed onto passport, was not supported by substantial evidence, where the IJ's statement that Indian government would not have embossed signature sheet on passport in such manner as to cover up other writing thereon was pure speculation, and where the IJ failed to address applicant's explanation for discrepancy in spelling based on fact that her first name was Punjabi word.

Credibility - Pre-REAL ID/Detail, Lack Of (2004). IJ's adverse credibility finding, to extent based upon applicant's initial lack of specificity regarding encounter between her father and Sikh militants, and upon fact that she provided more detailed account only upon prompting by the IJ, was not supported by substantial evidence; this encounter did not go to the heart of applicant's asylum claim, and it was pure speculation as to how much detail a truth-telling asylum applicant would have provided when testifying through translator who spoke broken English.

Credibility - Pre-REAL ID/Ignorance. Asylum applicant's purported ignorance as to whereabouts of her father, who was himself allegedly a victim of persecution by police, and her failure to produce affidavits or other evidence from relatives outside the US corroborating his disappearance, was not substantial evidence supporting IJ's adverse credibility finding, where applicant's purported ignorance was entirely consistent with her story.

- ✱ *Singh v. Ashcroft*, 367 F.3d 1182 (9th Cir. 2004) ((b) (6)); remanding with instructions to grant alien's motion to reopen; (1) fact that appeal of asylum denial was summarily dismissed did not compel finding that alien was not prejudiced by any ineffective assistance of counsel; (2) BIA could not require alien to submit brief on merits of asylum claim as part of his motion to reopen; W.FLETCHER.

Ineffective Assistance/Prejudice Found. "Stated affirmatively, '[t]o show prejudice, [Singh] must show that the BIA could plausibly have determined that he was [eligible for relief] based on the record before it.' [*Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 827 (9th Cir. 2003)]. In the record before it, the BIA had ample evidence that could plausibly have supported a finding that Singh was eligible for asylum. Singh testified credibly before the IJ that while he was in India he had been arrested and beaten numerous times because of his suspected connections to Sikh separatists affiliated with the All India Sikh Students Federation. In his motion to reopen, Singh reiterated the content of his underlying claim for asylum when he explained that he 'had suffered past persecution as he was detained and tortured by the Indian security forces for his alleged association with the Sikh separatist movement.'" (at 1189).

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- ✱ *Singh v. Ashcroft*, 362 F.3d 1164 (9th Cir. 2004) (*amending and superseding* 340 F.3d 802 *on denial of reh'g*) (b) (6); reversing adverse credibility determination and remanding for asylum consideration; WARDLAW.

Notice. BIA could not deny alien's motion to file a late brief by asserting that the motion was untimely because the BIA mailed the briefing notice to an address different from the one provided by the alien.

Credibility - Pre-REAL ID/Inconsistencies, No Attempt to Enhance Claim. Alien's first statement that he had no contact or connection with militants may be inconsistent with his later statement that he had declined to join a militant group; but alien is not claiming he was persecuted by militant Sikhs and repeatedly testified that the militants never acted unjustly toward him, and the discrepancy cannot be viewed as an attempt to enhance his claims. (at 1170-71).

- ✱ *Singh v. Ashcroft*, 301 F.3d 1109 (9th Cir. 2002) (b) (6); reversing adverse credibility determination and remanding for consideration of asylum and withholding; FERGUSON; (TALLMAN, dissenting, agreed that the discrepancies could plausibly be interpreted as not contradictory or as minor, but that such an interpretation is not *compelled* by the record).

Credibility - Pre-REAL ID/Corroboration Provided. "An adverse credibility determination may be reversed on appellate review when the applicant has provided corroborating evidence, even if the IJ had some basis for disbelieving the applicant. *Cf. Sidhu v. INS*, 220 F.3d 1085 (9th Cir. 2000) ('[W]here the IJ has reason to question the applicant's credibility, and the applicant fails to produce non-duplicative, material, easily available corroborating evidence and provides no credible explanation for such failure, an adverse credibility finding will withstand appellate review.')." (at 1112).

Credibility - Pre-REAL ID/Inconsistencies, Minor, Not Affirmed, India (2002). Minor discrepancy between alien's application and oral testimony regarding the location of a political rally he attended does not go to the heart of his claim. "The salient point for Singh's claim of persecution is that he actually attended a political rally, not its specific location." (at 1113).

- ✱ *Singh v. INS*, 292 F.3d 1017 (9th Cir. 2002); reversing adverse credibility determination and remanding for asylum consideration; McKEOWN; *distinguished by* *Li v. Ashcroft*, 378 F.3d 959 (9th Cir. 2004).

Credibility - Pre-REAL ID/Airport Interview. Asylum applicant's airport statement lacked sufficient indicia of reliability and accuracy on its own to constitute substantial evidence supporting an adverse credibility determination; applicant did not speak any English upon his arrival in the United States, the translator applicant was provided with during the airport interview did not speak applicant's language, the statement itself provided no information as to how the interview was conducted or the document prepared, and the interview did not afford applicant the sort of opportunity for explanation encompassed in an asylum application.

Credibility - Pre-REAL ID/Articulable Basis, Not Affirmed, India (2002). BIA reasons for discounting testimony of asylum applicant regarding two of his arrests in his native country did not create a legitimate basis to constitute substantial evidence supporting an adverse credibility determination.

- ✱ *Kaur v. INS*, 237 F.3d 1098 (9th Cir. 2001) (as amended by 249 F.3d 830 on denial of reh'g) (b) (6); remanding with instructions for the IJ to issue a subpoena requiring INS to produce the resource materials relied on by asylum officer and for a new asylum hearing; THOMPSON.

Evidence/Subpoena. IJ reviewing denial of asylum application was required, upon request, to issue subpoena directing INS to produce resource materials referred to by asylum officer in referral notice, where asylum officer had used resource materials to dispute applicant's credibility.

Evidence/Testimony, Declined To Provide; Asylum Application/Abandonment. Asylum applicants did not abandon their application for asylum and withholding by refusing to testify at asylum hearing after IJ improperly denied their request for subpoena for resource materials referred to by asylum officer in his referral notice, where applicants attended hearing, but declined to testify in absence of opportunity to review evidence essential to their asylum claim.

- ✱ *Kataria v. INS*, 232 F.3d 1107 (9th Cir. 2000) (b) (6); granting withholding and remanding for consideration of asylum claim; THOMPSON; *distinguished by Nagoulko v. INS*, 333 F.3d 1012 (9th Cir. 2001).

Credibility - Pre-REAL ID/Corroboration Not Required, India (2000); Explicit Finding Required, India (2000). BIA could not require asylum applicant from India to produce corroborating evidence, where BIA did not make explicit adverse credibility finding, but instead determined that applicant failed to meet his burden of establishing eligibility for asylum because his evidence and testimony raised questions about whether he was a Sikh, whether he lived in Punjab, and whether he was active in All India Sikh Student Federation (AISSF).

Persecution/Arrests; Detention, Not Affirmed, India (2000); Physical Harm, Not Affirmed (2000). Asylum applicant established that he suffered past persecution on account of political opinion, by testifying that he was arrested on two occasions by Indian police, detained for three days following second arrest, and beaten and subjected to electric shock torture, and that police took such actions because they knew he was member of AISSF and wanted him to cease his AISSF-related activities.

Past Persecution/Failure to Rebut, India (2000). Country conditions profile of India for 1996 did not rebut presumption that asylum applicant had well-founded fear of future persecution based on political opinion, arising from his activity in support of AISSF in Punjab; although profile stated that number of arrests and killings had declined significantly since late 1993 and early 1994, it also stated that Indian Human Rights Commission found that authorities continued to commit extrajudicial killings in 1994, and described level of violence in Punjab as only "lower."

* *Shah v. INS*, 220 F.3d 1062 (9th Cir. 2000) (b) (6); granting withholding and remanding for discretionary grant of asylum; (1) discrepancy in death certificate of applicant's husband was not proper basis for adverse credibility finding; (2) determination that applicant's testimony that her husband had been employed full-time for Bharatiya Janata Party (BJP) was inconsistent with passport indicating that he was chartered accountant was not supported by record; (3) State Department Report stating that electoral successes of BJP belied assertion that it was not possible for BJP member to live peaceably in India was not proper basis for adverse credibility finding; (4) applicant's failure to present documents underlying death certificate was not permissible basis for adverse credibility finding; (5) suggestion that letters submitted by applicant were unreliable or forgeries was impermissible basis for adverse credibility finding; (6) conclusion that it was not believable that applicant's husband received from BJP only the few letters that applicant submitted was not proper basis for adverse credibility finding; (7) assertion that applicant "should have been able to present other documentation to support her claims" was not proper basis for adverse credibility finding; (8) applicant suffered past persecution; (9) applicant proved well-founded fear of future persecution; and (10) State Department report was insufficient to rebut presumption that applicant was entitled to withholding of deportation; *FERGUSON*; *distinguished by Chebchoub v. INS*, 257 F.3d 1038 (9th Cir. 2001).

Credibility/Discrepancy, Spelling of Name; Typographical Error. Discrepancy in death certificate of applicant's husband, consisting of fact that official stamp was marked with date that preceded date listed as date of death, was not proper basis for credibility finding adverse to applicant seeking asylum based in part on husband's murder in India resulting from his political activism; discrepancy was capable of being attributed to typographical or clerical error, applicant was not evasive when asked about discrepancy, and neither IJ nor BIA explained why applicant would lie about date husband was killed.

Credibility/State Department Reports, Reliance On Rejected, India (2000). State Department Report stating that electoral successes of Bharatiya Janata Party (BJP) belied assertion that it was not possible for BJP member to live peaceably in India was not proper basis for BIA finding asylum applicant's claim that she faced persecution as BJP member not credible; evidence that individuals could live peacefully in some parts of India had no bearing on applicant's eligibility for asylum, State Department's assertion was speculative, BIA's exclusive reliance on blanket statement constituted failure to make individualized analysis of credibility; no evidence supported BIA's apparent belief that letters, which were purported to be from members of political party, were unreliable or forged, and BIA's belief to contrary was nothing more than subjective view of what letter from party leader to party member would look like.

Credibility/Corroboration Not Required, India (2000). Assertion by BIA that asylum applicant "should have been able to present other documentation to support her claims" was not proper basis for finding her not credible, since assertion was based on speculation and conjecture that people who had been members of political party for ten years would have the documentation to prove it, and there was no evidence in record that would indicate that documentation was available to applicant.

Persecution/Of Family, Not Affirmed (2000); Threats, Not Affirmed (2000). Applicant suffered past persecution, as required for asylum eligibility, where she testified credibly that members of

predominantly Muslim Congress Party (CP) murdered her husband in India and repeatedly threatened her and her family, all because they were affiliated with predominantly Hindu Bharatiya Janata Party (BJP).

- * *Sidhu v. INS*, 220 F.3d 1085 (9th Cir. 2000) (b) (6)); remanding with instructions to allow alien to call his father as a witness; (1) alien's varied answers about date of his father's emigration did not support adverse credibility determination; (2) alien may be required to present corroborating evidence in face of adverse credibility determination; but (3) due process required that alien be given second opportunity to establish eligibility for asylum where adverse credibility determination was based, without notice to alien, on alien's failure to produce his father as corroborating witness; HALL; *distinguished by Kataria v. INS*, 232 F.3d 1107 (9th Cir. 2000); *Arulampalam v. Ashcroft*, 353 F.3d 679 (9th Cir. 2003); *Shire v. Ashcroft*, 388 F.3d 1288 (9th Cir. 2004).

Credibility/Discrepancy, Dates. Alien's giving of varying answers regarding his father's date of entry into the United States did not amount to substantial evidence in support of adverse credibility determination, in proceedings on alien's asylum application, absent any indication that alien had incentive to lie about the date, or that date was relevant to alien's claim of persecution, and where alien attempted on several occasions to correct his testimony.

Due Process/Notice of Adverse Credibility. Due process required that asylum applicant be given second opportunity to prove his eligibility for asylum in hearing before IJ, where applicant received no notice that adverse credibility determination could be based on his failure to call his father as witness at original hearing, and *Mejia-Paiz* decision establishing rules regarding corroboration was not decided until after original hearing.

- * *Maini v. INS*, 212 F.3d 1167 (9th Cir. 2000) (b) (6)); reversing and remanding for a discretionary grant of asylum; (1) aliens suffered past persecution by members of Communist Party Marxist (CPM), and (2) fact that CPM was comprised of both Hindus and Sikhs did not preclude finding that it persecuted aliens because of interfaith marriage; FERGUSON.

Persecution/Threats, Not Affirmed, India (2000); Physical Harm, Not Affirmed, India (2000); Economic, Not Affirmed, India (2000); Of Family, Not Affirmed, India (2000); Marriage. Family of asylum applicants suffered past persecution in India when members of Communist Party Marxist (CPM), which police repeatedly refused to control, repeatedly threatened to kill father and mother, physically attacked son, and forced father to resign from his job, based on fact that mother was Sikh while father was Hindu.

Past Persecution/Source of Persecution. Fact that CPM in India was comprised of both Hindus and Sikhs did not preclude finding that it persecuted asylum applicants because father was Hindu and mother was Sikh. Any group, even a diverse one, that persecutes people for marrying between races, religions, nationalities, social group memberships, or people of certain political opinion is one that commits persecution on account of a protected ground for purposes of an asylum claim. "In light of our country's shameful history of bigotry, we find it disturbing that the BIA should categorically reject the Mainis' claim of persecution on the ground that the

CPM is diverse. The Supreme Court has recognized that there are institutions which can and do tolerate diversity while at the same time opposing intermarriage. In *Bob Jones University v. United States*, 461 U.S. 574, 580, 103 S. Ct. 2017, 76 L.Ed.2d 157 (1983), the court described a university admission policy that permits ‘unmarried Negroes to enroll; but a disciplinary rule prohibits interracial dating and marriage.’ Indeed, the court condemned this policy as discriminatory, reasoning that ‘[a]lthough a ban on intermarriage or interracial dating applies to all races, decisions of this court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination.’ *Id.* at 605, 103 S. Ct. 2017 (citations omitted). Thus, it does not follow from the mere fact that a group is diverse that it does not engage in persecution on account of a characteristic shared by some of its members. We hold that any group, even a diverse one, that persecutes people for marrying between races, religions, nationalities, social group memberships, or people of certain political opinion is one that commits persecution on account of a protected ground. In this case, the persecution was on account of religion because the CPM objected to the Maini’s interfaith practices.” (at 1175).

Nexus/Motive Found, Pre REAL ID, India (2000). Conclusion by BIA that persecution of family of asylum applicants in India by CPM was not on account of religion was not supported by substantial evidence; CPM beat and stabbed son for being half Hindu and half Sikh and told him to become pure Sikh, and father testified that CPM subjected him to death threats because of his interfaith marriage.

Nexus/Mixed Motive, Pre REAL ID, India (2000). Fact that one motive of CPM for persecuting asylum applicants in India was economic, as evidenced by applicant’s testimony that CPM threatened him both because he had married a Sikh and because they were jealous of his “post,” did not preclude finding that applicants were persecuted on account of religion.

Past Persecution/Failure to Rebut, India (2000). Applicants were entitled to withholding of deportation based on persecution by CPM in India because of their interfaith marriage, inasmuch as they showed past persecution threatening their lives or freedom, and INS failed to present any evidence that conditions in India had changed to such extent that it was no longer more likely than not that applicants would face persecution there.

Indonesia

Chronology

- ✖ *Budiono v. Lynch*, 837 F.3d 1042 (9th Cir. 2016)
- ✖ *Chandra v. Holder*, 751 F.3d 1034 (9th Cir. 2014)
- ✖ *Sumolang v. Holder*, 723 F.3d 1080 (9th Cir. 2013)
- ✖ *Viridiana v. Holder*, 646 F.3d 1230 (9th Cir. 2011)
- ✖ *Tampubolon v. Holder*, 610 F.3d 1056 (9th Cir. 2010)
- ✓ *Halim v. Holder*, 590 F.3d 971 (9th Cir. 2009)
- ✖ *Benyamin v. Holder*, 579 F.3d 970 (9th Cir. 2009)
- ✖ *Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009)
- ✓ *Loho v. Mukasey*, 531 F.3d 1016 (9th Cir. 2008)
- ✓ *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007) (en banc)
- ✖ *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004)

✓ *Affirmed*

- ✓ *Halim v. Holder*, 590 F.3d 971 (9th Cir. 2009) (b) (6); affirming the denial of a claim by an Indonesian of Chinese descent who was a practicing Catholic. Although the IJ found him not credible, the court accepted his testimony as true. The incidents which formed the basis of the claim were (1) he had been “stripped naked by students when he was in junior high school”; (2) “in High School, he was spat upon and threatened by Indonesian students,” (3) when ill, he had been refused service on racial grounds by a government clinic; (4) “he was arrested and detained for a couple of days when police stopped the car he was riding in . . . and claimed they found drugs; and (5) he “was beaten by a mob of rioters because he appeared to be Chinese.” CALLAHAN.

Persecution/Cumulative Effect (Insufficient), Indonesia (2009). The circuit found that even when considering all of this in the aggregate, past persecution had not been established. The circuit restated the principle that “persecution is an extreme concept that does not include every sort of treatment that our society regards as offensive,” citing *Wakary v. Holder*, 558 F.3d 1049, 1059 (9th Cir. 2009).

Well-Founded Fear/Ten Percent Rule, Affirmed, Indonesia (2009); Pattern or Practice, Affirmed, Indonesia (2009); Objective Evidence, Not Reported to Police. The circuit restated the principle that in order to establish a well-founded fear of persecution, the applicant need only demonstrate a ten percent chance of persecution. The circuit found that respondent had not met this threshold, citing to *Lolong v. Gonzales*, 484 F.3d 1173, 1179 (9th Cir. 2007) and *Wakary, supra*, for the finding that Indonesia lacks “institutional discrimination. The circuit found that “the record does not compel the conclusion that there exists a pattern or practice of persecution against Chinese and Christians in Indonesia.” The circuit noted that respondent had been protected by the Indonesian Army at the time he had been caught up in the riots. The

circuit also noted that he had not reported any of his problems to the police s, so there was “little to be found” in the record that the government either could not or would not be able to provide him with protection.

Well-Founded Fear/Disfavored Group. “Indonesia’s ethnic Chinese minority is a ‘disfavored group’ on the basis that there is a ‘long history of ethnic and religious strife in Indonesia.’” However, “even where an applicant has shown membership in a disfavored group, he or she must still present some evidence of individualized risk.” In rejecting this form of relief for respondent, the circuit relief on (1) the relative weakness of the claim of disfavored group; (2) the lack of evidence of approval of the alleged discrimination; and (3) respondent’s minimal showing of individualized risk. Respondent “failed to offer any evidence that distinguishes his exposure from those of all other ethnic Chinese Indonesians.”

- ✓ *Loho v. Mukasey*, 531 F.3d 1016 (9th Cir. 2008) (b) (6)); affirming a denial of relief on credibility grounds. The respondent was of Chinese ethnicity and a Christian. She asserted a pattern of physical violence and harassment against her and her family. O’SCANNLAIN.

Well-Founded Fear/Return Trips, Affirmed; Credibility/Return Trips. The court noted that the respondent came to the U.S. for periods of two weeks and ten days in 1998 and 2000 and voluntarily returned to Indonesia without making any claim for asylum. With regard to why she had not made a request given that these visits occurred during the period of her claimed persecution, the respondent testified in part that, “she didn’t know” about asylum. (at 1017). “[A]n alien’s history of willingly returning to his or her home country militates against a finding of past persecution or a well-founded fear of future persecution.” (at 1018) (citing *Kumar v. Gonzales*, 439 F.3d 520, 524 (9th Cir. 2006)). The court extended this principle as a permissible basis to find her incredible.

Persecution/Definition Of. The court restated the premise that persecution is “an extreme concept that does not include every sort of treatment our society regards as offensive.” (at 1017) (citing *Mansour v. Ashcroft*, 390 F.3d 667, 672 (9th Cir. 2004)).

- ✓ *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007) (*en banc*); reversing the panel decision and upholding a denial of relief for a single, ethnic Chinese, Christian woman; The factual basis of the claim was that, “Lolong’s father was arrested, detained for weeks at a time, and beaten ... several Indonesian youths attempted to rob Lolong’s uncle, but even after discovering that he was not carrying any money they beat him so severely that he required surgery ... [T]he church to which Lolong’s parents belong has received bomb threats.” (citing panel decision at 400 F.3d at 1223). BYBEE. Dissent by THOMAS.

Board of Immigration Appeals/Authority to Enter Orders. The court overruled its decisions of *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), and *Noriega -Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir. 2003), to hold that the Board may enter orders of removal when it reverses decisions by IJs which granted relief. *Id.* at 1177-78.

Persecution/Generalized Violence, Indonesia (2007). “We have consistently held that a general, undifferentiated claim of the type brought by Lolong does not render an alien eligible

for asylum. *See, e.g., Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (rejecting asylum claim based on general civil strife); *cf. Martinez-Romero v. INS*, 692 F.2d 595, 595-96 (9th Cir.1982) (noting that granting asylum based on claims of generalized civil strife ‘would permit the whole population [of the asylum-seeker's country]’ to remain in the United States[.] ... *Gomes v. Gonzales*, 429 F.3d 1264, 1267 (9th Cir.2005) (rejecting a pattern and practice claim because the State Department's Country Reports on Human Rights noted that ‘the Bangladesh government did not countenance attacks against Christians and intervened in such attacks to the extent that it was able’); *Mansour v. Ashcroft*, 390 F.3d 667, 673 (9th Cir.2004) (rejecting a pattern and practice claim by a Coptic Christian because the State Department Profile indicated that Egyptian government was not ‘unable or unwilling to control’ anti-Christian terrorists). *Id.* at 1180. “Lolong has provided nothing that suggests that her fears are distinct from those felt by all other ethnic Chinese Christians in Indonesia.” *Id.* at 1181.

Well-Founded Fear/Individualized Risk, Affirmed, Indonesia (2007). “Although Lolong provided evidence of violence directed at a friend and at members of her family, this evidence does not ... that she is more likely to be targeted for persecution or harassment than any other member of Indonesia's Chinese Christian community.” *Id.* at 1180 n.4. “Lolong's failure to allege that she faces an individualized threat distinguishes this case from our prior decisions.” *Id.* at 1180 n.5. This is so notwithstanding the “long history of ethnic and religious strife in Indonesia.” *Id.* at 1180. The court distinguished the holding in *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004), in that the applicant in *Sael* “presented some evidence of an individualized threat.” *Lolong*, 484 F.3d at 1180 n.5 (citing *Sael*, 386 F.3d at 927-30).

Country Reports/Appropriate to Rely On. “Where, as here, the petitioner does not allege an individualized risk of persecution but raises only a pattern-or-practice claim, it is entirely appropriate to rely on Country Reports in determining whether such a pattern or practice of persecution exists.” *Id.* at 1180 n.5.

✕ *Not Affirmed*

- ✕ *Budiono v. Lynch*, 837 F.3d 1042 (9th Cir. 2016) ((b) (6)); The IJ concluded that Budiono had a well-founded fear of future persecution and could not reasonably relocate within Indonesia, thus, qualifying him for withholding of removal. However, the IJ denied Budiono’s application because Budiono had provided material support to the JMA, a terrorist organization. See 8 U.S.C. § 1182(a)(3)(B). The Board affirmed the IJ’s conclusion that but for the terrorist bar, Budiono would be eligible for withholding of removal. The panel held the same burden of proof rules that apply to the persecutor bar apply here, and there was insufficient evidence showing JMA was a terrorist organization. TASHIMA. (Partial Concurrence and Partial Dissent by CALLAHAN)

Bars to Asylum/One Year Bar, Found, Indonesia (2016). The IJ and Board correctly found Budiono’s asylum application was time barred and his late filing was not excused. Budiono’s changed circumstances claim was based on the killing of his friend. The panel unanimously found “the killing of Budiono's friend at the hands of a different Muslim group was not a change from the circumstances Budiono faced before he fled. . . New evidence confirming what Budiono already knew—that moderate Muslims may face violent repression in Indonesia—does not constitute changed circumstances.” *Id.* at 1047.

Bars to Asylum/Terrorist Bar, Not Found. The IJ rejected Budiono's testimony about the JMA at the second hearing as not credible and relied entirely on Budiono's testimony at the first hearing in 2006 to support his factual findings. The IJ found that the JMA "intentionally harmed others as well as property in Indonesia from at least 1998 to 2000" and that "such harm in some instances was inflicted because of . . . religion; and/or decisions being made by the government." *Id.* at 1046. The IJ concluded that the JMA was a terrorist organization, and that Budiono's support of the JMA barred him from withholding of removal.

Burden of Proof, Not Met. The Government is required to make "a threshold showing of particularized evidence of the bar's applicability before placing on the applicant the burden to rebut it." *Id.* at 1048. The dissent agrees "that the government must first make a threshold showing that the terrorist bar may apply," but "would hold that the government has met this low threshold through circumstantial evidence." *Id.* at 1055.

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- * *Chandra v. Holder*, 751 F.3d 1034 (9th Cir. 2014) ((b) (6)); reversing a denial of an untimely motion to reopen. The respondent was an Indonesian of Chinese descent. A 2002 application for asylum was denied and indeed the Circuit affirmed such in an unpublished decision. Thereafter he "converted to Christianity." 751 F.3d at 1035. The MTR was on the basis of "changed circumstances in Indonesia." *Id.* Respondent cited various problems experienced by Christians thereat. The BIA denied the petition on the basis that "[c]hanges in the respondent's personal circumstances in the United States do not constitute sufficiently changed circumstances." *Id.* at 1036. PAEZ.

Motion to Reopen/Changed Circumstances, Personal, Not Affirmed, Indonesia (2014). The court cites to case law from other circuits, which have each determined "that the BIA must consider changed country conditions as they relate to a petitioner's change in personal circumstances." *Id.* at 1038. The court construes the pertinent regulation, 8 C.F.R. § 1003(c)(3)(ii), to require the respondent to "put forward material and previously unavailable evidence that the treatment for Christians had worsened between his previous hearing in 2002 and the filing of his motion to reopen." *Id.* at 1039. The decision recognizes the risk of "abuse" in that there is a legitimate interest "in preventing applicants from orchestrating changes that serve their self-interest," but holds that "[t]he timing of one's religious choice is not determinative of one's rights" and that it is "'the policy of the United States to stand with the persecuted.'" *Id.* (quoting *Negusie v. Holder*, 555 U.S. 511, 553 (2009)).

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- * *Sumolang v. Holder*, 723 F.3d 1080 (9th Cir. 2013); Reversing and remanding a denial of withholding of removal to a mother of Chinese-Christian ethnicity who had brought her ill three-month-old daughter, Monicha, to a public hospital, where she then died "because she failed to receive prompt medical attention" as a result of anti-Chinese-Christian animus. 723 F.3d at 1082. The BIA's decisions to deny asylum, because the application was not timely filed, and CAT relief were upheld. Respondent came to the United States in 1997. She remained in the United States without lawful authority after May 1998, but her application for asylum was not filed until 2002. WATFORD.

Bars to Asylum/One Year Bar, Found, Indonesia (2013). The IJ denied asylum, finding that Respondent's "filing delay was caused by her ignorance of the one-year filing deadline, not—as

[she] claimed – by the psychological trauma she experienced in the wake of Monicha’s death.” *Id.* The Circuit upheld this decision.

Changed Country Conditions/Changed Conditions Not Found, Indonesia (2013). Denial of asylum was upheld, notwithstanding the outbreak of anti-Chinese violence in May 1998 that continued through 2002. “Substantial evidence supports the IJ’s conclusion that such violence was at most no different in degree from the violence that had been ongoing when Ms. Notoredjo left Indonesia in 1997.” *Id.* at 1083.

Persecution/Of Family, Not Affirmed, Indonesia (2013). Withholding of Removal/Indonesia, Granted. The Circuit noted that “withholding of removal is a purely personal remedy, in contrast to asylum.” *Id.* However, “harm to a child can amount to past persecution of the parent when that harm is, at least in part, directed against the parent ‘on account of’ or ‘because of’ the parent’s race, religion, nationality, membership in a particular social group, or political opinion.” *Id.* “We have held that parents proved past persecution based in part on physical attacks against their half-Sikh, half-Hindu child, when the attacks were part of a campaign of persecution directed against the parents because of their inter-faith marriage.” *Id.* (citing *Maini v. INS*, 212 F.3d 1167, 1175–76 (9th Cir.2000)). The Circuit found that “the doctors and nurses deliberately ignored Monicha’s medical needs because her parents were Christian and her mother was Chinese. The hospital staff’s delay in administering medical care to Monicha was, at least in part, directed against Ms. Notoredjo and her husband because of her race and their religion.” *Id.* (emphasis omitted). The Circuit further found that the staff’s actions were “‘designed to send a message’ to Monicha’s parents and were calculated to inflict suffering on them through their child.” *Id.*

CAT/More Likely Than Not, Not Found, Indonesia (2013). The denial of relief under CAT was upheld “The events described . . . do not establish that she is more likely than not to be tortured if she returns to Indonesia.” *Id.*

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- * *Viridiana v. Holder*, 646 F.3d 1230 (9th Cir. 2011) ((b) (6)); reversing a denial of relief on the issue of a timely filing with regard to fraudulent actions by a non-lawyer immigration consultant. Respondent was of Chinese descent who had been “harassed, robbed, attacked, and sexually assaulted on account of her Chinese ethnicity.” (at 944). The circuit remanded the denial of withholding of removal so that the agency can reconsider it in light of intervening case law, *Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009). PAEZ.

Bars to Asylum/One Year Bar, Not Found, Indonesia (2011); Extraordinary Circumstances, Fraudulent Advice by Non-Lawyer. The circuit concluded that the non-lawyer consultant’s conduct was fraudulent and that it directly caused the late filing of the asylum application. The circuit thus concluded that “the immigration consultant fraud Viridiana experienced, and which caused her asylum application to be untimely, constitutes an ‘extraordinary circumstance’ warranting statutory tolling of her asylum application deadline under § 1158(a)(2)(D) and 8 C.F.R. § 208.4(a)(5).” (at 951). Thus the circuit read the “ineffective assistance of counsel” ground more broadly to include non-lawyers. With regard to *Lozada* principals, the circuit stated that “it was error to require Viridiana to comply with *Matter of Lozada* when she sought an exception under 8 U.S.C. § 1158 and 8 C.F.R. § 208.4(a)(5) for the circumstance of immigration consultant fraud, not ineffective assistance of counsel.” (at 949).

- ✱ *Tampubolon v. Holder*, 610 F.3d 1056 (9th Cir. 2010) (b) (6); in an amended decision after a petition for rehearing, the circuit reversed a denial of relief to an ethnically Indonesian Christian. There was no issue as to credibility. There was no timely application for asylum. The administrative decision did not consider the request for withholding of removal under the “disfavored group” analysis. The circuit found that “Christians are a disfavored group in Indonesia.” There was no claim of past persecution, and it is not apparent from the circuit’s decision that the disfavored group argument had even been presented to the Board, let alone the IJ. The decision does not cite *Halim v. Holder*, 590 F.3d 971 (9th Cir. 2009) where the “disfavored group” analysis was not sufficient to reverse a denial of relief to another Indonesian Christian. PREGERSON.

Particular Social Group/Disfavored Group, Not Affirmed, Indonesia (2010). “We must remand . . . to determine whether the combination of disfavored group evidence and individualized risk is sufficient to establish a clear probability that petitioners will be persecuted if removed to Indonesia.”

- ✱ *Benyamin v. Holder*, 579 F.3d 970 (9th Cir. 2009); remanding a denial of relief based on one child having had involuntary FGM and the risk of FGM to another daughter. The IJ had found that the procedure was “of a less extreme variety” as practice elsewhere and would not constitute past persecution. The parents were Muslim and Catholic. The wife reported “mistreatment . . . at the hands of his family, alienation and humiliation from friends, societal restrictions on [her] activities, and discrimination on the basis of religion perpetrated by the Indonesian government. . . .” These factors were not considered to constitute persecution and the circuit upheld the denial of claimed persecution on account of mixed religion marriage as a particular social group. McKEOWN.³⁴

³⁴ *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009) involved an I-589 claim governed by the REAL ID Act provisions. Notwithstanding such, it must be viewed as fully in accord with *Benyamin*, which was issued four days thereafter. The principal applicant was a Kenyan male who asserted a claim based on personal mistreatment that he and his wife (a derivative) had sustained at the hands of the Mungiki. The Mungiki is a group that the court labeled is “much given to violence” and one that “compels women . . . to undergo” FGM. The court noted that “the evidence of the Kenyan government’s complicity in the actions of the Mungiki is compelling.” The court reversed the Board’s denial of the claim on failing to meet the requisite degree of “social visibility” as the principal being a defector from the Mungiki (the principle was extended in *Wanjiru v. Holder*, 705 F.3d 258 (7th Cir. 2013), where another “defector” from the Mungiki had his denial of relief under CAT reversed and remanded, even though he had never been the subject of any violence, he had been a “low level member,” and this had occurred eight years previously). The Eighth Circuit also applied a broad reading of social group protection to an individual fleeing the Mungiki in *Gathugu v. Holder*, 725 F.3d 900, 906 (8th Cir. 2013). In *Gatimi*, the court further found a basis for relief in terms of the risk that Mrs. Gatimi might have of being subjected to FGM if she had to return to Kenya. The court rejected the Board’s position that because her claim had not “been filed within the one year statutory deadline . . . the only basis that she can claim is persecution of her husband.” The court explained that “the second form of persecution [the first being the” spouse or child of the primary asylum seeker]” occurs when “the spouse is sent back with the primary asylum seeker [since] she will be subjected to harms that constitute persecution of him.” “Genital mutilation of one’s

Persecution/FGM. The court reversed the determination that the FGM did not constitute past persecution, citing to *Abebe v. Gonzales*, 432 F.3d 1037, 1039 (9th Cir. 2005) (en banc). Referring to *Mohamed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005), the court stated “we have no doubt that the range of procedures known collectively as FGM rises to the level of persecution within the meaning of our asylum law.” The court further explained, “the BIA also erred in failing to consider whether the threat that [the other daughter] would be forced to undergo FGM could be a ground for relief. . . . Our case law treats claims of past persecution with as much rigor as those based on the threat of future persecution.”³⁵

Derivative Claims/Asylum, Constructive Deportation. The court states that there is a “unique issue - the effect that the BIA’s decision to deny relief to Benyamin will have on his alien minor children. Because a minor alien has no legal right to remain in the U.S., ‘deportation of her parents would result in her being constructively deported’ Thus when addressing the parent’s application for asylum, it is proper to consider not only the potential persecution the child may face, but also any hardship to the alien child due to the deportation on her parent.” (Supporting citations omitted). The court directed the Board on remand to specifically consider the risk to the other daughter.³⁶

wife, . . . is a way to punish one” so “the menace to Mrs. Gatimi is a legitimate component of Mr. Gatimi’s case. To send her back to Kenya to face FGM would be to enable persecution of him.” In *Kone v. Holder*, 596 F.3d 141 (2d Cir. 2010), the second circuit reversed a denial involving a woman who had FGM and expressed a fear that her daughter would be subject to the procedure if they had to return to the Ivory Coast. The court commented that humanitarian asylum might be available as the mother “faces the choice of seeing her daughter facing the same fate or avoiding that outcome by separating her from her child.”

³⁵ In *Karouna v. Holder*, 588 F.3d 234 (4th Cir. 2009), the court found past persecution involving the claim of a woman who had FGM. The IJ had found that the extent of the FGM was not sufficient in magnitude to constitute past persecution, but the court disagreed. The court also rejected a basis for denial of the claim resting on the failure of the alien to produce meaningful identification.

³⁶ In *Kone v. Holder*, 620 F.3d 760 (7th Cir. 2010) the circuit noted the progression of law in the FGM context. In *Kone*, an asylum claim had been rejected as untimely based on the respondents’ having waited to file the I-589 16 months after the birth of their USC daughter who faced a significant risk of FGM if she had to leave the US. The circuit stated “it is clear that FGM constitutes persecution under the asylum and withholding of removal standards, and torture under the CAT.” *Id.* at 765. The circuit did not accept the BIA’s rejection of the derivative basis for relief for either withholding of removal or asylum. It distinguished prior case law by noting that here, both parents of the daughter were in proceedings as opposed to one parent. The BIA’s decision regarding “direct persuasion” was also flawed. The circuit cited a number of holdings for the proposition that persecution of the applicant can be demonstrated on the basis of persecution of a close family member. *See e.g., Gatimi v. Holder*, 606 F.3d 344 (7th Cir. 2009) (involving a Kenyan man who faced retribution for defecting from the Mungiki criminal organization. “Part of Gatimi’s claim was that his wife would be subjected to FGM if returned to Kenya...We found that this potential harm to Gatimi’s wife could ‘constitute persecution of him.’”). *Kone* is an extension of this in that the circuit acknowledges “we see no evidence in this case indicating that [the USC daughter] would be subject to FGM to ‘punish’ her family.” The decision goes on to cite *Kone v. Holder*, 596 F.3d 141 (2d Cir. 2010); *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004). The circuit found that this direct persecution claim is just as amenable under CAT as it is under the asylum statute.

The court's decision does not mention the Board's previous holding in *Matter of A-K-*, 24 I&N Dec. 275, 279 (BIA 2007), which held that an alien could not be granted relief on the risk of FGM to a minor daughter and that there was not statutory basis for a grant of derivative asylum status to a parent based on the grant of asylum to his child. Despite the absence of reference to A-K-, the court's decision must be seen as having rejected A-K- by noting "the IJ erred in concluding that she could only consider whether Benyamin himself had suffered past persecution or had a well-founded fear of persecution."

- * ***Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009)** (b) (6); reversing and remanding a denial of relief. Credibility was not at issue. The respondent was a Pentecostal minister of Chinese ethnicity. He reported incidents of being assaulted, insulted, threatened, and theft of property by native "youths" when he was a child. As an adult, he was further harassed and threatened due to his ethnicity. A good friend who was also a Pentecostal was murdered and his church and minister were subjected to bombing attempts by "native Indonesian extremists . . . on account of their religion." The IJ rejected the asylum claim as untimely because it was filed more than six months after the respondent came out of status. The court upheld the denial of CAT relief. Most significantly, the Court found that the analysis required for considering "disfavored group" claims in the asylum context must be extended to withholding of removal claims notwithstanding the recognition of the difference in burden of proof between asylum and withholding of removal. "The question for the agency on remand will be whether Wakkary has adduced enough evidence of individualized risk, in combination with enough evidence that the ethnic and religious group to which he belongs is disfavored in Indonesia, to make out a clear probability of persecution upon return. BERZON.

Bars to Asylum/One Year Bar, Not Found, Indonesia (2009). Finding that the respondent was "taking time to gather identity documents and supporting documents he considered vital to his claim," the Court rejected the administrative rational that the delay could not be excused. The Court found that the general language at 8 C.F.R. § 208.4(a)(5), which sets forth reasons for permitting untimely applications, was sufficiently broad to encompass respondent's reasoning. The Court cited with approval *Husyev v. Mukasey*, 528 F.3d 1172 (9th Cir. 2008) for suggesting that a six month delay would be a "presumptive deadline" that would apply "in the absence of any special considerations."³⁷

Persecution/Discrimination, Not Affirmed, Indonesia (2009); Of Friends or Affiliates, Indonesia (2009). The Court accepted the administrative determination that there had not been a sufficient showing of past persecution. The Court characterized the initial experiences reported as "instances of discriminatory treatment" as opposed to persecution. The murder of Kalep and the attempted murder of Pastor Munthe, along with the attempted bombings, were not found to be part of a "pattern of persecution closely tied to Wakkary himself, as we have required," citing *Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991).

³⁷ The court found in *Blanco v. Holder*, 572 F.3d 780 (9th Cir. 2009), that an application which had been rejected because it was not accompanied by a signed check reflecting the required payment fee would still be deemed as having been duly filed on such date.

Well-Founded Fear/Pattern or Practice, Not Affirmed, Indonesia (2009). There are “two routes by which an asylum seeker can show that the objective risk of future persecution is high enough to merit relief . . . he may show that there is a ‘reasonable possibility’ that he will be ‘singled out individually for persecution’ . . . 8 C.F.R. § 1208.13(b)(2)(iii) . . . [or] he may show that there is a systematic ‘pattern or practice’ of persecution against the group to which he belongs . . . such that even without any evidence of individual targeting, his fear of persecution is deemed reasonable.” The Court accepted the administrative determination that the respondent failed to demonstrate that a pattern or practice of persecuting Chinese Christians existed in Indonesia. The Court cited *Bromfield v. Mukasey*, 543 F.3d 1071, 1078 (9th Cir. 2008) (finding a pattern or practice of persecution of gay men in Jamaica); *Knezevic v. Ashcroft*, 367 F.3d 1206 (9th Cir. 2004) (finding that Croats engaged in a pattern or practice of persecution against Serbs in Bosnia); *Mgojin v. INS*, 184 F.3d 1029 (9th Cir. 1999) (finding a pattern or practice of persecution of Kurdish-Muslim intelligentsia in Armenia). “Although the record contains evidence of widespread anti-Chinese and anti-Christian discrimination that affects a very large number of individuals, and although it is clear that a certain portion of those individuals suffer treatment that rises to the level of persecution, the record does not establish that the situation in Indonesia is similar to the pattern or practices of persecution defined in our prior case law.”³⁸

Withholding of Removal/Disfavored Group. The Court reversed the Board’s determination that in a withholding case, this form of relief is simply unavailable as a matter of law. In so holding, the court applied *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1994); *El Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004) (stateless Palestinians); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182-83 (9th Cir. 2003) (ethnic Albanians in Kosovo); *Singh v. INS*, 94 F.3d 1353, 1359-60 (9th Cir. 1996) (ethnic Indians in Fiji); *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004) (Chinese Christian women in Indonesia). “An individual seeking asylum must always show that he faces at least a ten percent chance of future persecution, whether he attempts to meet his burden by showing a pattern or practice or by showing a likelihood that he will be singled out.” In the face of criticism from other circuits, the holding justifies the Ninth Circuit approach by asserting that “the disfavored group concept simply describes the basic evidentiary proposition that an asylum applicant’s membership in a [disfavored group] . . . is relevant evidence in assessing whether his fear of being personally targeted for persecution in the future rises to the requisite level.” In other words, the standard for relief, “greater than 50%,” is the same as that for any individual seeking withholding of removal which is recognized as quite a bit higher than the mere 10% degree of risk, but the analysis must proceed in the same manner.

Well-Founded Fear/Individualized Risk, Not Affirmed, Indonesia (2009). The court distinguished *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007) (en banc), where relief was denied to an Indonesian Chinese Christian woman “because she offered no evidence of her own individualized risk” from *Sael v. Ashcroft*, *supra*, where “Sael met that burden by . . . showing that she personally had been threatened, her home vandalized, and her car thronged by a mob who saw that she was Chinese.”

Persecution/Random Attack, Indonesia (2009). The court reversed the IJ’s characterization of the problems as “random” and the IJ’s finding that they “had little or nothing to say about

³⁸ Only one other case, *Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. 2004), reflects Ninth Circuit case law rejecting a claim for protection as a member of a “disfavored group.” The respondent’s claim as a Coptic Christian from Egypt who complained of several incidents, including physical violence, was denied.

Wakkary's chances of future persecution." The court cited *Sinha v. Holder*, 556 F.3d 774 (9th Cir. 2009), as showing that "his harassers were motivated by anti-Chinese and/or anti-Christian sentiment."

CAT/More Likely Than Not, Not Found, Indonesia (2009). In upholding the denial of relief under CAT, the court explained that "the record contains no evidence whatsoever that Wakkary is likely to be tortured rather than persecuted by government officials or with their acquiescence . . . 8 C.F.R. § 208.18(A)(1)" notwithstanding all of the noted problems experienced by individuals of his group.

- ✱ *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004) (b) (6); remanding for a discretionary grant of asylum because ethnic Chinese are a disfavored group in Indonesia; Alien testified (see 924-27) as to acts of persecution inflicted upon her over a multi-year period, including: threats from native Indonesians; her car being repeatedly vandalized with sexist and racist words, its tires being slashed and ultimately being destroyed; a group of native Indonesians—shouting her name and saying the neighborhood was not for Chinese—attempted to break into the boarding house where she was living; the police told her not to file a report because an investigation would anger the perpetrators, which would only place her in greater danger. There was no claim of past persecution. The court cited the principle that a successful asylum seeker need only demonstrate a ten percent risk of future persecution. (at 925). B.FLETCHER.

Particular Social Group/Disfavored Group, Not Affirmed, Indonesia (2004). Indonesian alien of Chinese ethnicity established a credible fear of being hurt, raped or killed in Indonesia, and she demonstrated that Indonesians of Chinese descent were disfavored group and that she was particularly at risk, based on past threats and acts of violence against her.

Persecution/Economic, Not Affirmed, Indonesia (2004). "We recognize that Indonesia's ethnic Chinese minority is often described as economically powerful, but any reasonable factfinder would be compelled to conclude, in light of the record presented to [the IJ] and to the BIA, that the economic success of some ethnic Chinese is used as a convenient, recent justification for an anti-Chinese sentiment that has remained constant even as periods of social and political unrest have alternated with periods of relative calm.... Government efforts to stop this cycle of scapegoating and violence have thus far been ineffective, perhaps because ethnic Chinese are still targets of official discrimination." (at 926).

Iran

Chronology

- ✓ *Bojnoordi v. Holder*, 757 F.3d 1075 (9th Cir. 2014)
- ✓ *Najmabadi v. Holder*, 597 F.3d 983 (9th Cir. 2010)
- ✗ *Taslimi v. Holder*, 590 F.3d 981 (9th Cir. 2010)
- ✗ *Cinapian v. Holder*, 567 F.3d 1067 (9th Cir. 2009)
- ✗ *Khunaverdians v. Mukasey*, 548 F.3d 760 (9th Cir. 2008)
- ✗ *Hakopian v. Mukasey*, 551 F.3d 843 (9th Cir. 2008)
- ✓ *Toufighi v. Mukasey*, 510 F.3d 1059 (9th Cir. 2007), *amended by* 538 F.3d 988 (9th Cir. 2008)
- ✗ *Hosseini v. Gonzales*, 471 F.3d 953 (9th Cir. 2007)
- ✓ *Nahroani v. Gonzales*, 399 F.3d 1148 (9th Cir. 2005)
- ✓ *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004)
- ✗ *Jahed v. INS*, 356 F.3d 991 (9th Cir. 2004)
- ✗ *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000)
- ✗ *Zahedi v. INS*, 222 F.3d 1157 (9th Cir. 2000)

✓ Affirmed

- ✓ *Bojnoordi v. Holder*, 757 F.3d 1075 (9th Cir. 2014) ((b) (6)); upholding a denial of asylum to an individual who had been found to have provided “material support” to a Tier III³⁹ terrorist organization. It was held as a matter of law that he was ineligible for any form of relief other than deferral of removal under the Convention Against Torture, which he had provided. The respondent argued that the level of the assistance he had provided to the organization, Mojahedin-e Khalq (“MEK”), was not sufficient to have triggered the statutory bar and additionally that it would be impermissible to have applied the bar retroactively. Credibility was not an issue. GOULD.

Bars to Asylum/Material Support, Retroactivity, Iran (2014). MEK was designated as a “Tier I terrorist organization” from 1997 to 2012. The respondent’s activities predated this designation. The court held that “the statutory terrorism bar applies retroactively to an alien’s material support of a ‘Tier III’ terrorist organization.” *Id.* at 1078 (citing *Haile v. Holder*, 658 F.3d 1122, 1125-26 (9th Cir. 2011)).

³⁹ “The [INA] divides ‘terrorist organization’ into three categories: a ‘Tier I’ organization is officially designated by the Secretary of State as a foreign terrorist organization under 8 U.S.C. § 1189; a ‘Tier II’ organization is otherwise designated as a terrorist organization by the Secretary of State in consultation with the Attorney General or Secretary of Homeland Security; and a ‘Tier III’ organization is ‘a group of two or more individuals . . . which engages in’ terrorist activities as defined by 8 U.S.C. § 1182(a)(3)(B)(iv)(I)-(VI).” 757 F.3d at 1077 n.1 (citing INA § 237(a)(3)(B)(iv)(I)-(III)).

Bars to Asylum/Material Support, Level of Evidence, Iran (2014). “The INA defines ‘terrorist organization’ and ‘engaging in terrorist activity’ broadly.” *Id.* at 1077. In upholding the administrative determination, the court relied on information from a 2001 State Department report on terrorism, as well as “other secondary materials.” *Id.* at 1078. The bar was properly applied because “Bojnoordi passed out flyers, wrote articles, and trained MEK members on the use of guns in the mountains outside of Tehran, knowing that this training would further MEK’s goals. . . . Bojnoordi has not shown by ‘clear and convincing evidence that he did not know, and should not have reasonably known’ that MEK was a terrorist organization during the time he gave it material support.” *Id.* (citing INA § 237(a)(3)(B)(iv)(VI)(dd); *Khan v. Holder*, 584 F.3d 773, 785 (9th Cir. 2009)).

- ✓ ***Najmabadi v. Holder*, 597 F.3d 983 (9th Cir. 2010)** (b) (6); upholding a denial of a motion to reopen in which the movant sought to file an asylum application based on being a “westernized woman” who had spent 23 years living in the U.S. and “has the appearance and mannerisms of an Iranian-U.S. citizen.” Her first claim was filed in April 2000, when she stated that “there wasn’t any particular reason” that she had left Iran but rather “everything changed especially for a woman like me . . . due to its then war with Iraq.” She testified that she is not sure if she can live there, and after 16 years knows the U.S. “now probably more than her country.” There had been no claim of past persecution. The circuit upheld the Board’s denial of her claim in an unpublished decision: “Relying on *Fisher v. INS*, 79 F.3d 955, 962-63 (9th Cir. 1996) (en banc) we rejected [her] claim that she had a well-founded fear of future persecution based on her refusal to conform to the social norms of Iran.” Respondent based her motion to reopen on “changed circumstances in Iran.” She cited the terrorist attacks of September 11, 2001 and Iranian ties to “terrorists,” as well as reduced human rights. There was no assertion that anyone in Iran had now developed a particular interest in harming this respondent. Rather, she was concerned that the Iranian government would perceive her as pro-U.S. and pro-Western, and she does not agree with how the government treats their women and people in general. She stated that she will be active in trying to change Iran and the situation for women. SMITH; dissent by PREGERSON.

Motion to Reopen/Changed Circumstances, Affirmed, Iran (2010). In upholding the denial, the court characterizes respondent’s evidence as pertaining to “generalized conditions in Iran” that fail to demonstrate “that her predicament is appreciably different from the dangers faced by her fellow citizens. Citing *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998).

Motion to Reopen/Changed Circumstances, Personal, Affirmed, Iran (2010). “We have recognized the perverse incentive that would result from granting an applicant reopening based on a self-induced change in personal circumstances; here, [her] desire to become politically active, following her previous testimony to the contrary. See *He v. Gonzales*, 501 F.3d 1128, 1132 (9th Cir. 2007); *Larnagar v. Holder*, 562 F.3d 71, 76-77 (1st Cir. 2009).

Well-Founded Fear/Fear As Alien Removed From U.S. “We have previously rejected an asylum claim based on the hatred of Iranians for Americans, noting that this type of claim cannot possibly justify asylum, because it would mean that every citizen of a country unfriendly to the U.S. would be entitled to asylum.” See *Kaveh-Haghig v. INS*, 783 F.2d 1321, 1323 (9th Cir. 1986).

Particular Social Group/Disfavored Group, Affirmed, Iran (2010). The proposed group would be: westernized women forcibly removed from the U.S. to Iran. Citing to *Wakkary v. Holder*, 558 F.3d 1049, 1066 (9th Cir. 2009) (a general undifferentiated claim based solely on the threat to the group as a whole is not sufficient for an individualized petitioner to establish the requisite likelihood of persecution under the “singled out individually” rubric), the court notes that Respondent has pointed to no evidence of an individualized threat to persecute her.

- ✓ *Toufighi v. Mukasey*, 510 F.3d 1059 (9th Cir. 2007), amended by 538 F.3d 988 (9th Cir. 2008) (b) (6); upholding a denial of a motion to reopen. The respondent had been denied asylum. He sought to have his case reopened on the bases that he had married a U.S. citizen and there were “changed circumstances.” The IJ “found that Toufighi has not in fact converted to Christianity” because he could not give accurate information about his religion and the claim was a “ruse.” (at 1060). “The changed circumstances to which Toufighi referred did not address religion...but sought to show that since the latest Iraq war, Iran had been persecuting proponents of liberal pro-Western or pro-American ideologies...” (at 1062 n.5) The respondent made an untimely request to reopen and had not departed in the time frame authorized by the IJ. The motion was denied on those bases. SINGLETON. There was a dissent by BERZON.

Motion to Reopen/Changed Circumstances, Affirmed, Iran (2008). “[T]he Board rejected the motion to reopen based on changed circumstances in Iran because it was not supported by evidence that Toufighi would be directly affected by the alleged changes.” (at 1062). In upholding that decision: “We find that the IJ did reject Toufighi’s assertion of conversion, and that we now lack jurisdiction to review the IJ’s original determination because Toufighi’s opportunity to appeal that determination lapsed ninety days after the Board’s Order” dismissing the appeal. (at 1064).

Particular Social Group/Not Found, Iran (2008). “We have never recognized pro-Western as a social group protected against persecution, and agree with the Seventh Circuit that such a proposition is debatable at best. *Sharif v. INS*, 87 F.3d 932, 936 (7th Cir. 1996); see also *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996)(en banc).” (at 1067) (internal quotation marks omitted).

- ✓ *Nahrvani v. Gonzales*, 399 F.3d 1148 (9th Cir. 2005) (b) (6); See **Germany** (Iranian who fled persecution in Iran was granted asylum in Germany and was firmly resettled. Alien did establish past persecution in Iran so as to justify withholding of removal to that country).
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- ✓ *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004) (b) (6); See **India** (Indian Muslim failed to establish that the Iranian military sought to recruit or harm him on account of a protected ground).

✕ **Not Affirmed**

- ✱ ***Taslimi v. Holder*, 590 F.3d 981 (9th Cir. 2010)**; reversing a denial of asylum based on a finding that the application had not been timely filed. Credibility was not at issue. Respondent was granted withholding of removal and protection under CAT. Respondent further took issue with the entry of an order of removal. Respondent entered the U.S. in October 1992. She “converted to Christianity” in September 2002 and “learned of asylum in March or April of 2003.” She filed her application on April 2, 2003. PREGERSON.

Bars to Asylum/One Year Bar, Not Found, Iran (2010). Respondent “did not apply for asylum immediately after her decision because she wanted to be sure it would be a life-long decision.” “The IJ reasoned that [respondent] had lived in the US since 1992 and had ‘ample opportunity to avail herself of resources regarding the laws of asylum.’” The circuit found that this analysis “misses the mark.” In the circuit’s view, to enforce the one year bar would have placed respondent in an “untenable position” in that she wanted to be sure of the “sincerity of her faith” before making the application.”

Withholding of Removal/Order of Removal. “When an IJ decides to grant withholding of removal, an explicit order of removal must be included in the decision. . . . In instances in which an IJ grants both asylum and withholding of removal, an order of removal would not normally be required, as an asylum grant does not require an order of removal.”

- ✱ ***Cinapian v. Holder*, 567 F.3d 1067 (9th Cir. 2009)** (b) (6); remanding a denial of relief to a family who were ethnic Armenians and Christians. The adult parents had “discussed the tenets of the Christian faith with a 13 year old Muslim boy.” In an incident in 1999, local police “broke down Petitioners’ door and beat and arrested” the parents. The IJ found the respondents not to be credible. This assessment was based “in large part because of ‘major inconsistencies and problems’ related to ‘where they are from’ which the IJ concluded ‘went to the heart of the claim.’” HAWKINS.

Due Process/Right to Confrontation; Credibility/Documents to Impeach, Rejected; Evidence/Hearsay, Cannot Rely On, Iran (2009). The Government provided forensic reports, which stated that a birth certificate was “counterfeit” and that documents offered to prove the bona fides of the Christian faith had been produced from a master copy by a color copier, to the respondents for the first time at the individual calendar hearing. The respondents asserted they had no knowledge of their documents being false. The Court cited *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988), *Saidane v. INS*, 129 F.3d 1063, 1066 (9th Cir. 1997), and *Baliza v. INS*, 709 F.2d 1231, 1234 (9th Cir. 1983), for the “importance of the right to confront evidence and

cross-examine witnesses in immigration cases.”⁴⁰ The court found “prejudice” and would not permit the adverse credibility finding to stand.⁴¹

- ✱ *Khunaverdians v. Mukasey*, 548 F.3d 760 (9th Cir. 2008) (b) (6); reversing a denial of asylum on the basis of failure to show that the application had been timely filed. The respondent had been granted withholding of removal. SEDGWICK

Bars to Asylum/One Year Bar, Not Found, Iran (2008). Respondent had given conflicting information as to just when he had entered the United States. He did not have any corroborative evidence. The court restated its case law that in its view gave it jurisdiction to hear challenges to denials of asylum based on findings of untimely applications. The court distinguished *Sillah v. Mukasey*, 519 F.3d 1042 (9th Cir. 2008), where the court upheld the denial of asylum based on untimely filing, by noting that the statute does not “require an alien to establish by clear and convincing evidence his or her exact arrival date.” The court found that because the applicant could not have been shown to have falsely testified regarding the events giving rise to his claim which happened in Iran within one year of his actual filing of the application, it simply could not have been found to have been untimely.

- ✱ *Hakopian v. Mukasey*, 551 F.3d 843 (9th Cir. 2008) (no A number provided); rejecting an administrative finding of an untimely filed I-589. The application would have been timely, if the respondent had indeed entered this country on the date claimed. BEA.

Bars to Asylum/One Year Bar, Not Found, Iran (2008). the NTA charged the date of entry as apparently set forth on the I-589. The Respondent admitted the same. The application was found untimely in that no documentation or supportive material was offered by the

⁴⁰ In *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010), the circuit took a broad view of a respondent’s right of confrontation as to the charges made against him, by directing the disclosure of the A file to that individual who made a derivative claim of U.S. citizenship.

The court in *Villa-Anguiano v. Holder* rejected the reinstatement of a prior removal order as constitutionally infirm where it was found that he had the right to the “informed exercise of prosecutorial discretion. 727 F.3d 873 (9th Cir. 2013).

⁴¹ With regard to an asylum seeker’s evidence, courts have rejected field investigative reports which stated that such evidence was fraudulent as prepared by Department of State officers in *Anim v. Mukasey*, 535 F.3d 243 (4th Cir. 2008); *Lin v. U.S. Dept. of Justice*, 459 F.3d 255 (2d Cir. 2006); *Alexandrov v. Gonzales*, 442 F.3d 395 (6th Cir. 2006); *Ezagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003). In *Banat v. Holder*, 557 F.3d 886 (8th Cir. 2009), the Eight Circuit reversed a denial of relief by finding a due process violation where the Board relied on hearsay in a Department of State investigative report “which suggested that the letter [setting forth the crux of the claim] had been fabricated.” *Balachova v. Mukasey*, 547 F.3d 374 (2d Cir. 2008) would not permit reliance on a consular officer’s report that had used to deny relief in that it did not adequately describe the investigator’s qualifications, identify specific individuals who provided information, and explain what if any efforts were made to verify the information provided.

Ching v. Mayorkas, 725 F.3d 1149 (9th Cir. 2013), holds that there is a constitutional right of confrontation of adverse information that had been used to deny an I-130 visa petition. The “signed statement was accepted as true without affording the [petitioners] the opportunity for cross-examination.” (at 1156).

Respondent to support the asserted date of entry. The Court held that the admission of the charge in the NTA constituted a “judicial admission of the date of entry” and could not be questioned by the absence of any supportive or corroborative material.

- ✱ ***Hosseini v. Gonzales*, 471 F.3d 953 (9th Cir. 2007)** (b) (6); denying the respondent’s applications for relief, including adjustment of status, on the bases of “terrorist connected activities and his fraud.” The court, CANBY, upheld the administrative denials of asylum and adjustment of status, granted deferral of removal under CAT. The respondent denied supporting an officially designated terrorist group. The withholding of deportation denial was reversed and remanded.

Discretion/Administrative Exercise Of, Upheld, Iran (2007). “In light of the uncontested evidence that Hosseini perpetrated fraud throughout his immigration proceedings, the BIA’s discretionary denial” was accepted.

Withholding of Deportation/Terrorist Bar. The administrative finding that “he is a danger to the security of the U.S.” was not accepted. The court cited *Cheema v. Ashcroft*, 383 F.3d 848 (9th Cir. 2004), for the holding: “it is impermissible to find that an alien is a danger to the security of the U.S. solely because he engaged in terrorist activity [T]here must be a finding supported by substantial evidence that links the terrorist activity with one of the criteria relating to our national security.”

CAT/Bars to Withholding. The court held that *Cheema* did not apply to withholding under the CAT.” The court accepted the administrative findings that the respondent was involved in fundraising and recruiting “for a designated terrorist organization.” The evidence adduced was found to be “minimal,” but it did not “compel a contrary result.”

CAT/Deferral of Removal, Not Affirmed, Iran (2007). The court reversed the administrative finding that the respondent had failed to meet his burden of proof. In doing so, the court once again relied on general documentary evidence (*see Al Harbi v. INS*, 242 F.3d 882 (9th Cir. 2001); *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001)), notwithstanding its explicit and repeated agreement that the respondent admitted to falsifying documents and making fraudulent statements to immigration officials at nearly every stage of his proceedings.”

- ✱ ***Jahed v. INS*, 356 F.3d 991 (9th Cir. 2004)** (b) (6); remanding for a discretionary grant of asylum; TROTT; (KOZINSKI, dissenting, urges greater deference to the BIA: “Maybe there’s something in the water out here, but our court seems bent on denying the BIA the deference a reviewing court owes an administrative agency.”)

Nexus/Mixed Motive, Pre REAL ID, Iran (2004). BIA should not have ignored or discounted political context of Iranian soldier’s prior threats toward alien, in allegedly warning alien that he would report him for associating with rival political group persecuted by Iran’s current government, simply because soldier, in suggesting that alien could purchase his silence by paying him large sums of money, had been motivated by his personal desire for financial gain; alien’s evidence, viewed in its totality, clearly established causal connection between persecution, fear of future persecution, and alien’s political opinion.

Well-Founded Fear/Continued Family Presence, Iran (2004). Mere fact that relative of alien who remained behind in Iran had not been “set upon” by officials in Iranian government was manifestly irrelevant to whether alien had established a well-founded fear of persecution.

- ✱ *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) ((b) (6)); granting withholding and remanding for a discretionary grant of asylum; FERGUSON.

Credibility - Pre-REAL ID/Inconsistencies, Minor, Not Affirmed, Iran (2000). Inconsistency between written statement that alien was sentenced to 75 lashes for interfaith dating, and his testimony that he was whipped 75 times on day police caught him with woman of another faith, was not permissible basis for adverse credibility finding; discrepancy concerned one among many attacks inflicted over several days, and there was no indication in record as to why applicant would lie about when police whipped him. Discrepancy between direct testimony and cross-examination as to whether beatings occurred in the street or at the police station was an impermissible basis for finding the alien not credible. Nor could the IJ discredit alien’s testimony because of the IJ’s belief that he should have bled as a result of such beatings.

Nexus/Mixed Motive, Pre REAL ID, Iran (2000); Neutral Law. While the police may have initially stopped alien to enforce a neutral law against embracing, the police beat, tortured, detained, and sentenced alien for interfaith dating, saying he was a “dirty Armenian” who had no right to be with a Muslim woman, and that this constitutes persecution. (at 1168).

- ✱ *Zahedi v. INS*, 222 F.3d 1157 (9th Cir. 2000) ((b) (6)); granting withholding and remanding for a discretionary grant of asylum; B.FLETCHER.

Burden of Proof. Rejection of documentary evidence must be based on specific, cogent reasons that bear a legitimate nexus to the rejection. (at 1165).

Well-Founded Fear/Iran, Objectively Reasonable, Found, Iran (2000). Documentary evidence, consisting of summons for alien to appear in court for interrogation, notice declaring time for applicant to appear in court to answer allegations of reproduction of banned novel, letter to Islamic Revolutionary Court stating that applicant had been active in distributing novel, and death certificate of novel’s translator, along with background evidence submitted by applicant, made out objective component of a well-founded fear of future persecution.

Iraq

Chronology

- ✓ *Malkandi v. Mukasey*, 544 F.3d 1029 (9th Cir. 2008), amended by 576 F.3d 906 (9th Cir. 2009)
- ✗ *Mousa v. Mukasey*, 530 F.3d 1025 (9th Cir. 2008)
- ✗ *Hanna v. Keisler*, 506 F.3d 933 (9th Cir. 2007)
- ✗ *Gulla v. Gonzales*, 498 F.3d 911 (9th Cir. 2007)
- ✗ *Al-Saher v. INS*, 268 F.3d 1143 (9th Cir. 2001)
- ✗ *Al-Harbi v. INS*, 242 F.3d 882 (9th Cir. 2001)

✓ Affirmed

- ✓ *Malkandi v. Mukasey*, 544 F.3d 1029 (9th Cir. 2008), amended by 576 F.3d 906 (9th Cir. 2009) (b) (6); affirming a denial of relief. Respondent was charged with being removable because there were reasonable grounds to believe that he would be a “danger to national security.” He was characterized as a “‘travel facilitator’ for a notorious Al Qaeda operative whom the intelligence establishment believes was involved in several of Al Qaeda’s most infamous attacks against the U.S.” Respondent had been interviewed by an FBI agent in a national security investigation and conceded having concocted a false story so as to obtain the refugee status that brought him and his family to the U.S. MCKEOWN.⁴²

Bars to Asylum/Terrorist Bar, Affirmed, Iraq (2008). The court expressed its agreement with *Yusupov v. Ashcroft*, 518 F.3d 185, 200 (3d Cir. 2008) which disapproved of the standard set forth by the Atty. Gen. In *Matter of A-H-*, 23 I&N Dec. 774, 789 (AG 2005) so that “the alien must actually ‘pose a serious danger’ to U.S. security” as contrasted to the view of the AG: “if there is information that would permit a reasonable person to believe that the alien *may* pose a danger to the national security.” (Emphasis in original). In upholding the adverse credibility determination the court applied the terms of the REAL ID ACT in terms of the broad amount of evidence that may be considered and found there to be “substantial evidence” to justify the finding. This included reliance on general documentary materials such as the 9/11 report. The court equated the government’s burden in establishing this so that an individual would not be

⁴² After remand, *Yusupov 1*, the Board again denied withholding of removal as concluding that the respondents pose a risk to the national security. The court reversed. *Yusupov v. Holder*, 650 F.3d 968 (3d Cir. 2011). The court rejects the Board’s finding which had been based on the DHS testimony of a DHS agent assigned to a local Joint Terrorism Task Force who discussed eight factors to substantiate his opinion from his investigation. The court makes frequent reference to the *Malkandi* decision in terms of discussing the amount of evidence sufficient for the government to meet its burden. The court characterizes the Board’s conclusion as “impermissibly speculative” and that the evidence presented did not meet “probable cause. Guilt by association does not suffice.”

eligible for any relief under asylum, withholding of removal, or under either form of CAT as “akin to probable cause for believing that Malkandi posed a danger to the U.S.”⁴³

CAT/Deferral of Removal, Affirmed, Iraq (2008). Respondent “was found to be ineligible because he posed a threat to national security.” In other words, “under the national security bar to withholding of removal and deferral of removal under CAT, Malkindi needed to prove by a preponderance of the evidence that such grounds do not apply, 8 CFR § 1208.16(d)(2), which he failed to do.”

✕ *Not Affirmed*

- ✕ *Mousa v. Mukasey*, 530 F.3d 1025 (9th Cir. 2008) ((b) (6)); reversing and remanding a denial of a Chaldean Christian on credibility grounds as well as the alternative holding on changed country conditions. PREGERSON.

Credibility/Shame. “The IJ could not reconcile Mousa’s years of resistance to joining the Baath Party with the Baath Party reputation for ruthless recruitment tactics.” (at 1027). In rejecting this position, the court stated: “We have previously held, however, that a petitioner’s ability to withstand severe persecution does not make it more likely that such persecution occurred.” *Id.* (citing *Gui v. INS*, 280 F.3d 1217, 1226-27 (9th Cir. 2002)). “We also reject the IJ’s and the BIA’s primary reason for finding Mousa incredible: Mousa’s failure to mention her rape” at any time prior to the hearing before the IJ. *Id.* The court cited to *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052-53 (9th Cir. 2002) for the proposition that her prior unwillingness to disclose this was justified by “her cultural reluctance to admit the fact that it occurred.” (at 1028). With regard to the concern over whether there was an adequate explanation over a “leg infection,” the court quoted *Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 2000): “[T]he mere omission of details is insufficient to uphold an adverse credibility determination.” (at 1029).

Past Persecution/Changed Conditions Not Found, Iraq (2008); Failure to Rebut, Iraq (2008). There was an alternative finding by the IJ that even if past persecution had been established, “the fall of Saddam Hussein and the Baath Party” justified a denial. (at 1029). The court cited to *Hanna v. Keisler*, 506 F.3d 933, 938 (9th Cir. 2007) as to the risk that one would fear persecution “from others in a post-Saddam Hussein Iraq.” (at 1030).

- ✕ *Hanna v. Keisler*, 506 F.3d 933 (9th Cir. 2007); reversing and remanding a denial based on changed country conditions and inadequate consideration of an alternative request for

⁴³ There may be an issue whether one can still be eligible for deferral of removal under CAT even with a finding that an alien “posed a danger to the security of the U.S.” The general authorizing section, 8 CFR § 1208.17, does not contain any bar. In *Singh v. BIA*, 253 F. App’x 91 (2d Cir. 2007) (unpublished), the court found the IJ’s adverse credibility determination flawed and remanded the case. The IJ had found such a threat to national security. The court held that the issue had not been properly raised on appeal to the Board and was thus deemed abandoned. Hence, the finding that he posed such a threat was not disturbed. The court commented that “Singh remains eligible for deferral of removal under CAT,” citing to 8 CFR § 1208.17(a).

“humanitarian asylum.” The BIA found past persecution based on events that occurred during the regime of Saddam Hussein, which has since been overthrown. PREGERSON.

Past Persecution/Changed Conditions Not Found, Iraq (2007); Failure to Rebut, Iraq (2007). “The government did not make any showing regarding whether Hanna would likely fear religious persecution from others in post Saddam Hussein Iraq.” (at 938).

Past Persecution/Humanitarian Asylum, Standard. “The BIA may grant humanitarian asylum to a victim of past persecution, even when the government has rebutted the applicant’s fear of future persecution, if the applicant establishes one of two things. First, the asylum seeker can show ‘compelling reasons for being willing or unable to return to the country that he fled arising out of the severity of the past persecution.’ 8 C.F.R. 1208.13(b)(1)(iii)(A). Or, under the second prong of the humanitarian asylum analysis the asylum seeker can show a ‘reasonable possibility that he or she may suffer other serious harm upon removal to that country.’ 8 C.F.R. § 1208.13(b)(1)(iii)(B); *see also Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. 2004).” (at 939).

- ✱ ***Gulla v. Gonzales*, 498 F.3d 911 (9th Cir. 2007) (Real ID Act);** reversing and remanding a discretionary denial of asylum to a Catholic, ethnic Chaldean citizen of Iraq; The respondent reported various problems that he and his family had experienced under the government of Saddam Hussein. Respondent paid a smuggler to obtain false travel papers so as to be able to emigrate to Turkey. He then traveled to Greece and Mexico before coming to the United States. The IJ denied asylum in the exercise of discretion but granted withholding of removal to Iraq upon the finding of past persecution; PREGERSON.

Discretion/Administrative Exercise Of, Not Upheld, Iraq (2007). The court commented that “it is rare” to deny asylum in the exercise of discretion – pointing to the only case where it had been upheld, *Alsaghladi v. Gonzales*, 450 F.3d 700 (7th Cir. 2006). (at 916). The reliance by the IJ upon use of fraudulent documents, the payment of significant sums of money to smugglers, the presence in three countries before coming to the U.S. where claims for asylum could have been made were all found to be insufficient bases to deny the claim.

Dissent by FERNANDEZ. Judge Fernandez stated that the decision was another example of the court “picking apart the opinions of the agency,” and noted that “Congress expressed its disdain for that approach when it amended the Immigration and Nationality Act to blunt some of the more obvious maneuvers” (at 920). (Fernandez, J., dissenting).

- ✱ ***Al-Saheer v. INS*, 268 F.3d 1143 (9th Cir. 2001) (as amended by 355 F.3d 1140 (9th Cir. 2004))** (b) (6); remanding for a grant of CAT withholding; HUG; *distinguished by Ndom v. Ashcroft*, 384 F.3d 743 (9th Cir. 2004).

Persecution/Arrests, Iraq (2001). Although alien had been arrested three times in Iraq, his first was based on his misrepresentation of his religion to the military, his second involved a security concern, and treatment of alien following his third arrest did not demonstrate persecution.

CAT/Torture, Found, Iraq (2001). Alien was subjected to sustained beatings for a month following his arrest, was beaten severely and burned with cigarettes over an eight-to-ten day

period following his second arrest, and had managed to escape and avoid further beatings following his third arrest, which was based on his imputed political opinion.

- ✱ *Al-Harbi v. INS*, 242 F.3d 882 (9th Cir. 2001) ((b) (6)); granting withholding and remanding for discretionary grant of asylum on the basis of documentary evidence alone as to the objective component of the claim, even with an adverse credibility finding being upheld in terms of specified acts; Alien did not suffer persecution based on alleged interrogation and beating that occurred when he rejoined military pursuant to grant of amnesty to deserters, inasmuch as there was no evidence that interrogation and beating took place other than applicant's testimony and his application for asylum, and his testimony failed to establish link between alleged interrogation and beating and his actual or imputed political opinion. BERZON.

Credibility - Pre-REAL ID/Propensity for Dishonesty, Not Affirmed. Alien's propensity to change his story regarding incidents of past persecution justified an adverse credibility determination against his testimony.

Evidence/Testimony in Light Of Adverse Credibility. "In light of the adverse credibility finding, we consider Petitioner's testimony on this issue only to point the way to areas of inquiry, and look for support only to the documentary material in the record." (at 891).

Well-Founded Fear/Objectively Reasonable, Found, Iraq (2001). Alien established a well-founded fear of future persecution on account of imputed political opinion, based on his evacuation to U.S. territory by U.S. agencies, even though his testimony was not credible, inasmuch as documentary evidence indicated that all individuals who were evacuated to Guam at same times as applicant genuinely entertained subjective fear of persecution, and that such fear had objective basis in that he would be associated by Iraqi regime with American airlift and assumed to be dissident, and likely would be persecuted.

Israel

Chronology

- ✖ *Baballah v. Ashcroft*, 367 F.3d 1067 (9th Cir. 2004)
- ✓ *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000)

✓ *Affirmed*

- ✓ *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000) ((b) (6)); upholding denial of asylum, withholding, and voluntary departure; petition denied; THOMAS; *distinguished by* *Baballah v. Ashcroft*, 367 F.3d 1067 (9th Cir. 2004).

Persecution/Harassment, Israel (2000); Not Rising to Level Of, Israel (2000). Israeli citizen of Palestinian ancestry and of the Muslim faith's detention and questioning by the Shabak and local police may have constituted harassment but didn't rise to the level of persecution; he was detained and questioned by the Israeli police for only short periods of time, was never jailed or charged with any crime, and was never handcuffed, beaten or threatened injury by the Shabak.

Well-Founded Fear/Individualized Risk, Affirmed, Israel (2000). "[Alien's] contention that conditions in Israel are otherwise 'extremely volatile' and that the Israeli government and other radical groups have used 'brutal and torturous' tactics against Palestinians is simply too generalized to show that he is at 'particular risk' of persecution." (at 1101).

Voluntary Departure/Good Moral Character. Alien's admission that he paid a smuggler to bring his wife and child into the U.S. illegally precluded him from meeting the good moral character component for voluntary departure.

✖ *Not Affirmed*

- ✖ *Baballah v. Ashcroft*, 367 F.3d 1067 (9th Cir. 2004) (*amending* 336 F.3d 995 (9th Cir. 2003) *on denial of reh'g*) ((b) (6)); granting withholding and remanding for a discretionary grant of asylum to Israeli citizen of Palestinian ethnicity who was Muslim; PAEZ.

Persecution/Cumulative Effect, Israel (2004); Physical Harm Not Necessary, Israel (2004). Repeated attacks by Israeli Marines over a ten year period, which included endangering his crew by causing his boat to fill with water, shooting bullets over the boat, spraying highly pressurized water at boat's occupants in freezing temperatures, and destroying his fishing nets, constituted persecution by the government, even without physical harm.

Persecution/Economic, Not Affirmed, Israel (2004). Purely economic harm can rise to the level to constitute persecution where there is a probability of deliberate imposition of substantial economic disadvantage based on one of the protected grounds. This need not be to the extent that the applicant simply could not support his family. To determine if past persecution has

been established, all acts must be considered in the aggregate, even though single acts by themselves would not be found to constitute such.

Nexus/Motive Found, Pre REAL ID, Israel (2004); Religion/Non-Jew; Ethnicity/Not Affirmed, Israel (2004). Both alien's belief and the use of the derogatory slur "goy" (non-Jew), demonstrate that the Israeli Marines were motivated at least in part by alien's ethnicity and religion.

Unable or Unwilling to Control/Reporting Not Required, Not Affirmed, Israel (2004). Alien was not required to report the persecution he suffered to the police because the persecutors "were themselves government actors, conclusively establishing the third prong of the analysis by showing government involvement." (at 1078).

Italy

Chronology

- ✓ *Truong v. Holder*, 613 F.3d 938 (9th Cir. 2010)

✓ *Affirmed*

- ✓ *Truong v. Holder*, 613 F.3d 938 (9th Cir. 2010) (b) (6); affirming a denial of relief. The lead respondent and his family are citizens of Vietnam, where he suffered persecution. The family was granted “temporary resident status” in Italy. They voluntarily left Italy for the United States in 1991, and overstayed their authorization. The circuit found the two children “totally Americanized.” Due to their length of stay in the United States, they had lost their refugee status in Italy. Credibility was not at issue. Their claim was based on problems that the family experiences while living in Italy, where “they had begun receiving threats from Vietnamese Communists living in the area. . . . On two separate occasions in 1991, Mr. Truong was shot at while driving his car at night. He filed police reports on both occasions but the police did nothing.” The circuit accepted the Board’s finding that the family “failed to show that the persecution was by the hands of the government or other group of persons whose actions the government is unable or unwilling to control.” PER CURIUM. Concurrence by REINHARDT, which emphasized equitable factors in the family’s favor and urged prosecutorial discretion.

Unable or Unwilling to Control/Police Response. “Although the Truongs contend that their harassment came at the hands of communist forces, the record suggests that this contention is speculative. The Truongs simply cannot and do not know who their assailants were and what motivations they have had. We also note that the Truongs’ professed belief that the Italian government was complicit in or unwilling to stop their harassment is undermined by the fact that the Truongs repeatedly sought assistance from the Italian police, who dutifully made reports after each incident and indicated that they would investigate. Without more, we are reluctant to infer government complicity or indifference from the mere fact that the Italian police were unable to locate the Truongs’ unknown assailants.” *Cf. Singh v. INS*, 134 F.3d 962, 968 (9th Cir. 1998) (in a case involving a minority Indo-Fijian whose claim was denied, police responded to petitioner’s location when she called but took no further action. This could have been due to a lack of suspects, few leads, etc.)

Credibility/State Department Reports, Reliance on Permitted, Italy (2010). Notwithstanding the absence of any adverse credibility determination by the IJ, the circuit did not accept the lead Respondent’s opinion regarding the Italian authorities’ lack of protection. The circuit considered the documentary evidence of record. Regarding the evidence offered by the respondent, the circuit noted that “at best, they show that ethnic minorities and immigrants living in Italy face sporadic violence and discrimination, they do not suggest that the Italian government is complicit in or unwilling to combat such discrimination. To the contrary, the

2003 State Department Country Report for Italy states that ‘the Government generally respected the human rights of its citizens and the law and judiciary provided effective means of dealing with individual instances of abuse.’”

✕ *Not Affirmed*

Jamaica

Chronology

- ✖ *Bromfield v. Mukasey*, 543 F.3d 1071 (9th Cir. 2008)

- ✓ ***Affirmed***

- ✖ ***Not Affirmed***

- ✖ *Bromfield v. Mukasey*, 543 F.3d 1071 (9th Cir. 2008) (b) (6); reversing a denial of relief to an aggravated felon. The basis of the claim was that the respondent “came out” as a gay man after he had come to the United States. He did not claim any prior persecution. Notwithstanding his return to Jamaica and having an amicable relationship with his father, the court found that the Department of State country report “compels the conclusion that the Jamaican government. . . Acquiesces in the torture of gay men. . . .” The relief requested was withholding of removal and protection under CAT. FLETCHER.

Particular Social Group/Homosexuals, Jamaica (2008). The court cited *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) as holding that “homosexuals are members of a particular social group.” The court found that a Jamaican law which criminalizes homosexual activity constitutes “persecution” as opposed to “legitimate criminal prosecution” because it is “motivated by a protected ground,” i.e. being gay. The court also found that “there exists a pattern or practice of persecution of gay men.”

CAT/Acquiescence, Not Affirmed, Jamaica (2008). The court found that the “acquiescence” requirement under 8 CFR § 1208.18(a)(1) “requires only that public officials were aware of the torture ‘but remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it,’ citing *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006).

Jordan

Chronology

✓ *Ramahi v. Holder*, 725 F.3d 1133 (9th Cir. 2013)

✓ *Affirmed*

- ✓ *Ramahi v. Holder*, 725 F.3d 1133 (9th Cir. 2013) (b) (6)). Upholding a denial of asylum on the basis of an untimely application. The IJ granted withholding of removal. This case involves a claim by a husband and wife who came to the United States to escape persecution by the wife's brothers, "because he was an outsider, and as a result, the brothers refused to give Al Sharif [the wife's] share of the inheritance from their father." 725 F.3d at 1136. The wife entered the United States on July 1, 2007, with authority to remain until December 31, 2007. In November 2007, the couple learned of further threats against them. Their joint application for asylum and associated relief was not filed until April 20, 2009. IKUTA.

Bars to Asylum/One Year Bar, Found, Jordan (2013). "According to the petitioners, their delay in filing asylum applications was reasonable because of various barriers they encountered after their lawful status elapsed, including deficient advice from [lawyer] Klein, their inability to retain other attorneys, and (once they did retain legal counsel) their inability to file asylum applications due to having been served Notices to Appear." *Id.* at 1138. The Circuit restated the expectation that a reasonable period of time to file an otherwise untimely application for asylum after an event that constituted an extraordinary circumstance, such as the expiration of legal status, would be six months. *See, e.g., Wakkary v. Holder*, 558 F.3d 1049, 1059 (9th Cir. 2009). The Circuit did not accept the argument that their inability to retain counsel earlier did not justify the delay: "the petitioners could have filed asylum applications themselves" or "could have filed affirmative asylum applications with the Department of Homeland Security's Asylum Office even after the government served them with Notices to Appear." 725 F.3d at 1139.

Counsel/Non-Compliance with Lozada. The Board had not accepted Ramahi's claim that he was given ineffective assistance of counsel because he had not complied with the Lozada requirements. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). This finding was upheld by the Circuit. "Compliance with Lozada ensures that the BIA has an objective basis "for assessing the substantial number of claims of ineffective assistance of counsel that come before [it]." 725 F.3d at 1139 (citing *Reyes v. Ashcroft*, 358 F.3d 592, 596 (9th Cir. 2004)) (alteration in original).

✗ *Not Affirmed*

Kazakhstan

Chronology

- ✓ *Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009)

- ✓ ***Affirmed***

- ✓ *Parussimova v. Mukasey*, 555 F.3d 734 (9th Cir. 2009) (*amended opinion issued, denying motion for rehearing*) (b) (6); affirming a denial of relief to an ethnic Russian woman who experienced a “harsh” life. (at 737). She had been “permanently affected” by her experiences and “discrimination.” *Id.* A family member had been killed because of his ethnicity. The respondent had been violently assaulted and almost raped, lost consciousness, all while being told that she was a “Russian pig[]” and “we had to get out of their country.” *Id.* When she unsuccessfully sought police assistance, she was subjected to additional threats. She was found to be credible. The issue was presented as to whether under the REAL ID Act, the mistreatment was “on account of” a protected criteria. O’SCANNLAIN.⁴⁴

Nexus/Central Reason, Post REAL ID, Affirmed, Kazakhstan (2009). The court reviewed its pre-REAL ID Act case law such as *Briones v. INS*, 175 F.3d 727 (9th Cir. 1999) and *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) and found that such had been superceded by the REAL ID Act’s requirement that the protected criteria be “at least one central reason” for the persecution. (at 740). The court held that this requirement did not mean that the successful application must demonstrate that “such reason account for 51% of the persecutor’s motivation.” *Id.* Rather, it must be shown that such would have been “primary, essential, or principal,” which is significantly high than the prior 9th Circuit standard of it being “a mere part.” *Id.* “A motive is central if that motive standing alone would have led the persecutor to harm the applicant.” The court then cited approvingly *Matter of J-B-N & S-M*, 24 I&N Dec. 208, 214 (BIA 2007).

Nexus/Mixed Motive, Post REAL ID, Kazakhstan (2009); Ethnicity/Affirmed, Kazakhstan (2009). The court found there to be “at least three possible reasons for attacking her.” (at 741). It found that only her ethnicity would be a possible basis for relief. The other factors included: her public association with an American company, “her vulnerability as a young woman walking alone to sexual assault,” and her unsuccessful attempt to obtain police protection. *Id.* Although the assailants were aware of her ethnicity and used it as a means to degrade her, there was not found to be a causal connection between the characteristic and the violence that followed.

⁴⁴ On remand from the Ninth Circuit, the Board held in *Matter of C-T-L-*, 25 I & N Dec. 341 (BIA 2010), that “the one central reason standard” applies as well to requests for withholding of removal even in the absence of an explicit statutory directive.

✱ ***Not Affirmed***

Kenya

Chronology

- ✖ *Owino v. Holder*, 771 F.3d 527 (9th Cir. 2014)
- ✖ *Mutuku v. Holder*, 600 F.3d 1210 (9th Cir. 2010)
- ✖ *Owino v. Holder*, 572 F.3d 780 (9th Cir. 2009)
- ✖ *Li v. Keisler*, 505 F.3d 913 (9th Cir. 2007)
- ✖ *Njuguna v. Ashcroft*, 374 F.3d 765 (9th Cir. 2004)

✓ *Affirmed*

✖ *Not Affirmed*

- ✖ *Owino v. Holder*, 771 F.3d 527 (9th Cir. 2014) ((b) (6)); remanding a denial of relief “to (1) reconsider whether a continuance should have been granted after evaluating all of the factors set out in *An Na Peng v. Holder*, 673 F.3d 1248, 1253 (9th Cir. 2012);” (2) determine whether Owino had a new claim for CAT relief in light of the DHS’s breach of his right to confidentiality; and “(3) reconsider its findings on Owino’s credibility and his original CAT claim in light of all evidence in the record.” *Id.* at 539. The case had previously been remanded to the IJ to determine the application’s merits under the REAL ID Act. *Id.* at 530. Four days before the IJ was scheduled to issue her decision on remand, Owino moved to admit new evidence. *Id.* at 531. The IJ denied both the motion and the application for relief under CAT, and the BIA affirmed. *Id.* PER CURIAM.

CAT/Evidence, Kenya (2014). The IJ should consider four factors when determining whether or not to grant a continuance: ““(1) the nature of the evidence excluded as a result of the denial of the continuance, (2) the reasonableness of the immigrant’s conduct, (3) the inconvenience to the court, and (4) the number of continuances previously granted.”” *Id.* at 532 (quoting *An Na Peng*, 673 F.3d at 1253).

CAT/Right to Confidentiality, Kenya (2014). Since public disclosure of information contained in asylum applications has the potential to “subject an applicant to retaliatory measures in his country of origin and endanger his relatives still residing abroad . . . federal officials must, with limited exceptions, maintain in confidence information relating to applicants’ asylum applications.” *Id.* at 533 (citations omitted). Breach of confidentiality may give rise to a new claim when the disclosure of confidential information brings the applicant “to the attention of the government authority or nonstate actor against which the claimant has made allegations of mistreatment.” *Id.* at 535 (citation and internal quotation marks omitted).

Credibility – Post-REAL ID/Corroboration, Sufficiency, Kenya (2014). The Circuit stated that the BIA “cannot assume a witness’s testimony is false for the purpose of denying relief on one ground, then assume that the same testimony is true for the purpose of denying relief on another.” *Id.* at 536. In addition, “[a]n IJ may not refuse to credit testimony merely because of the witness’s relationship with the alien and consequent interest in helping him.” *Id.* at 538 (citations omitted).

- ✱ ***Mutuku v. Holder*, 600 F.3d 1210 (9th Cir. 2010) (b) (6)**; reversing and remanding a denial of withholding of removal. The respondent asserted a claim of past persecution due to political activities. The respondent claimed that she had “been almost hit” by a member of an opposing political party driving his truck at her, her house had been burned down, and family members had been threatened and harassed. The claim had been denied based on a finding of incredibility and changed country conditions. PREGERSON.

Bars to Asylum/One Year Bar, Found, Kenya (2010). The circuit upheld the finding that the respondent’s asylum application was untimely, noting that “Mutuku’s hope that conditions in Kenya would improve does not constitute an extraordinary circumstance justifying her delay in applying for asylum.”

Credibility - Pre-REAL ID/Detail, Lack Of (2010). The fact that the respondent’s application had not mentioned the detail of the claimed attempted vehicular assault that she presented in her testimony was not an adequate basis for an adverse credibility finding.

Country Reports/To Rebut Past Persecution, Insufficient, Kenya (2010); Past Persecution/Changed Conditions Not Found, Kenya (2010); Past Persecution/Country Reports, Use of Rejected, Kenya (2010). The IJ noted that the party to which the respondent belonged was now a member of the country’s ruling coalition government and that the leader of the party was elected president. The court found past persecution. The circuit reversed the conclusion that country conditions had changed because other information in the state department country report indicated that the country’s human rights record “remained poor.”

CAT/Country Conditions. The circuit upheld the denial of CAT relief. The circuit held that country conditions were not of a sufficient magnitude to prompt reversal “because country conditions alone can play a decisive role in granting relief under CAT.”

- ✱ ***Owino v. Holder*, 575 F.3d 956 (9th Cir. 2009);** remanding a denial of relief for failure to apply the standards of the REAL ID Act which governed this application. PER CURIAM.

Credibility - Post-REAL ID/REAL ID Standard. “Even assuming credibility, the act permits an IJ to ‘determine what the applicant should provide evidence which corroborates otherwise credible testimony.’” The court recognized this as a departure from pre-REAL ID Act case law.

- ✱ ***Li v. Keisler*, 505 F.3d 913 (9th Cir. 2007);** considering the standards to be applied with regard to EAJA fees in cases where the government had sought a voluntary remand, prior to oral argument, with regard to petitions for review filed by aliens seeking judicial review of adverse administrative decisions. One of the cases involved a claim from a woman who feared FGM if she had to return to Kenya; PER CURIAM.

EAJA Fees. The administrative position which had denied relief was found to have violated “clearly established law” and hence justified the request for EAJA fees. It is important to note that the administrative decision was prior to Ninth Circuit case law directly on point.

- * *Njuguna v. Ashcroft*, 374 F.3d 765 (9th Cir. 2004) ((b) (6)); vacating denial of withholding and asylum, granting withholding, and remanding for a favorable discretionary grant of asylum; HUG.

Well-Founded Fear/Objectively Reasonable, Found, Kenya (2004). Kenyan established a well-founded fear of persecution based on his acts in opposition to alleged corruption in Kenya’s current regime, in assisting Kenyan women who had allegedly been sold into de facto slavery to the Saudi royal family to escape from their alleged captors while present in the United States, based upon evidence of threats which were made against alien by Kenyan officials after he had provided this assistance, and based on evidence of the imprisonment, attacks on, and threats against members of alien’s family still present in Kenya, some of which attacks were accompanied by specific threats against alien. There was no physical violence to the alien, nor was there a claim of past persecution.

Credibility/Corroboration Provided (2004). “The finder of fact may not circumvent a credibility finding by labeling compelling circumstantial evidence ‘speculative.’” (at 771).

Well-Founded Fear/Ten Percent Rule, Not Affirmed, Kenya (2004). A one in ten chance is sufficient to establish a well-founded fear.

Nexus/Retribution, On Account of Protected Ground, Kenya (2004). Retaliation against an alien or members of her family who advocated against government corruption can be “on account of” political opinion.

Asylum Application/Granted to Family Member. The fact that other family members had their cases granted was relevant in that “similarly situated individuals [should] be treated similarly.” (at 771, n. 4).

Kuwait

Chronology

✖ *El Himri v. Ashcroft*, 378 F.3d 932 (9th Cir. 2004)

✓ *Affirmed*

✖ *Not Affirmed*

✖ *El Himri v. Ashcroft*, 378 F.3d 932 (9th Cir. 2004) ((b) (6)); reversing IJ's denial of asylum and withholding and upholding denial of CAT; Jordan was improperly designated as a country of removal; petition granted and reversed; HUG.

Well-Founded Fear/Pattern or Practice, Not Affirmed, Kuwait (2004). Stateless Palestinian established an objectively reasonable fear of future persecution based on his minority status; Kuwait had engaged in forced expulsions, extreme persecution, and discrimination of Palestinians, Palestinians who remained in Kuwait were denied right to work, go to school, or obtain drinking water, and Palestinians had heightened risk of abuse by police.

Well-Founded Fear/Individualized Risk, Not Affirmed, Kuwait (2004). "[Aliens'] membership in [Palestinian] minority makes it more likely than not that, if they returned to Kuwait they would suffer the same economic discrimination that has made life in Kuwait virtually impossible for their fellow Palestinians. [Aliens'] burden to show a personalized risk of persecution is relatively low because Kuwait's policy of discriminating against its entire Palestinian population is well-established." (at 937). They did not establish past persecution. (at 936). This decision is an extension of *Baballah v. Ashcroft*, 367 F.3d 1067 (9th Cir. 2004), in which the applicant was a Palestinian who was a citizen of Israel.

Country of Removal/Acceptance of Alien. "[A]t the time the government proposes a country of removal pursuant to [INA § 241(b)(2)(E)(vii)], the government must be able to show that the proposed country *will* accept the alien." (at 939). This is so, even when the aliens "hold Jordanian travel documents." (at 934).

Laos

Chronology

- ✖ *Siong v. INS*, 376 F.3d 1030 (9th Cir. 2004)
- ✖ *Vongsakdy v. INS*, 171 F.3d 1203 (9th Cir. 1999)
- ✓ *Vang v. INS*, 146 F.3d 1114 (9th Cir. 1998)
- ✓ *Yang v. INS*, 79 F.3d 932 (9th Cir. 1996)

✓ *Affirmed*

- ✓ *Vang v. INS*, 146 F.3d 1114 (9th Cir. 1998) ((b) (6)); upholding denial of asylum based on firm resettlement in France; upholding denial of withholding; petition denied; D.W. NELSON; distinguished by *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814 (9th Cir. 2004).

Bars to Asylum/Firm Resettlement, Found, Laos (1998). Laotian nationals were firmly resettled in France prior to entering the United States, and their minor child thus was ineligible for asylum, notwithstanding that France could forbid his return because his French travel document expired after he entered the United States. Alien never became a national or citizen of France.

Withholding of Deportation/Laos, Denied (1998). Alien born in refugee camp in Thailand to Laotian Hmong parents, who was subject to deportation to Thailand, France, or Laos in that order, was not entitled to withholding of deportation on ground that he would face persecution as enemy of Laotian government if returned to Laos; alien failed to show that France would refuse to accept him or that Thailand would forcefully repatriate him, and none of his family had been in Laos in nearly 20 years. This is so, even with alien's father having "fought in the CIA's secret army against the Laotian communists." (at 1115).

- ✓ *Yang v. INS*, 79 F.3d 932 (9th Cir. 1996); See **France** (upholding denial of asylum based on firm resettlement in France after determining that 8 C.F.R. § 208.14(c)(2) effectively harmonizes sections 207 and 208 by closing a loophole incentive to illegal immigration).

✖ *Not Affirmed*

- ✖ *Siong v. INS*, 376 F.3d 1030 (9th Cir. 2004); See **France** (death threats and attacks in France on Laotians who fought against the communists).
-

- ✖ *Vongsakdy v. INS*, 171 F.3d 1203 (9th Cir. 1999) ((b) (6)); reversing BIA's denial of withholding and finding alien eligible for asylum; remanded; A Laotian citizen who supported the monarchy was imprisoned by the communist government in a labor camp. He was

physically and verbally abused, deprived of adequate food, suffered serious physical injury, and was denied medical care, which resulted in permanent impairment. Alien was found eligible for relief on the basis of past persecution irrespective of the future risk. REINHARDT.

Lebanon

Chronology

- ✓ *Arbid v. Holder*, 674 F.3d 1138, amended and superseded by 700 F.3d 379 (9th Cir. 2012)
- ✗ *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005)

✓ *Affirmed*

- ✓ *Arbid v. Holder*, 674 F.3d 1138, amended and superseded by 700 F.3d 379 (9th Cir. 2012) (b) (6); affirming a denial of relief. Respondent was found to have been convicted of a particularly serious crime and hence ineligible for asylum or withholding of removal. His claim under CAT was denied. PER CURIAM.

Bars to Asylum/Particularly Serious Crime, Found, Lebanon (2012). Respondent had been convicted of mail fraud.⁴⁵ “Arbid was sentenced to sixteen months in prison and was ordered to pay more than \$650,000 in restitution.” 700 F.3d at 382. The court found that the *Frentescu* factors had been properly applied in the exercise of administrative discretion.

Changed Country Conditions/Changed Conditions Found, Lebanon (2012). “Conditions in Lebanon [have] changed such that it [is] no longer more likely than not that Arbid would be tortured upon his return there. Since the late 1990s when Arbid was persecuted for his anti-Syrian views, the Syrian military has withdrawn from Lebanon, an anti-Hezbollah majority has wrested control of the legislature, and the political leader Arbid previously supported has returned from exile to help govern the state. This evidence does not compel a different result.” *Id.* at 383.

✗ *Not Affirmed*

- ✗ *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005) (b) (6); reversing IJ’s denial of asylum and withholding, and remanding for discretionary grant; PREGERSON.

Particular Social Group/Homosexuals, Lebanon (2005). “[T]o the extent that our case-law has been unclear, we affirm that *all* alien homosexuals are members of a ‘particular social group.’ . . . [There is] no appreciable difference between an individual, such as [alien], being persecuted for being a homosexual and being persecuted for engaging in homosexual acts.” (at 1172).

⁴⁵ The Board in *Matter of R-A-M-*, 25 I&N Dec. 637 (BIA 2012) held that a conviction for possession of child pornography would be deemed a PSC.

Well-Founded Fear/Return Trips, Not Affirmed. Alien's two short trips back to the country he was fleeing, to attend to his dying father and mother, did not cut against his claim of fear of future persecution; visits only lasted total of three months, alien only returned because parents were dying, out of fear of persecution one trip was cut short and alien returned to United States before father's funeral, and second trip was delayed out of fear of persecution.

Lithuania

Chronology

- ✓ *Kazlauskas v. INS*, 46 F.3d 902 (9th Cir. 1995)

✓ ***Affirmed***

- ✓ ***Kazlauskas v. INS*, 46 F.3d 902 (9th Cir. 1995)**; affirming IJ's denial of asylum and withholding; (1) applicant did not have well-founded fear of persecution if he returns to Lithuania based on dramatic changes in Lithuania since August 1991 failed coup attempt in Soviet Union; (2) IJ did not abuse discretion by concluding that harassment and ostracism by his teachers and peers that applicant suffered was not atrocious past persecution to warrant discretionary grant of asylum; and (3) IJ's denial of waiver of deportation was supported by substantial evidence; WIGGINS; (NOONAN, dissenting, argued that the IJ failed to consider all the factors favorable to the petitioner).

Past Persecution/Changed Conditions Found, Lithuania (1995). Applicant did not have well-founded fear of persecution if he returns to Lithuania, where State Department country report described dramatic changes in country since August 1991 failed coup in Soviet Union, with Lithuanian authorities fully assuming reins of government, enacting numerous laws to protect individual rights, and discontinuing many of former Soviet practices of surveillance and control, and where there had been no reports of conduct by Lithuanian authorities similar to repressive and abusive conduct by former Soviet authorities.

Persecution/Harassment, Lithuania (1995). IJ did not abuse his discretion by concluding that harassment and ostracism by his peers and teachers that asylum applicant suffered in Soviet Union because he was religious and resisted participation in programs sponsored by Communist Party was not such atrocious past persecution as to warrant discretionary grant of asylum.

✗ ***Not Affirmed***

Marshall Islands

Chronology

✓ *Konou v. Holder*, 750 F.3d 1120 (9th Cir. 2014)

✓ *Affirmed*

✓ *Konou v. Holder*, 750 F.3d 1120 (9th Cir. 2014) (b) (6); affirming a denial of relief. Respondent is gay. He reported having been “sexually assaulted and beaten as a homeless, homosexual child. The authorities there allegedly did nothing to intervene.” *Id.* at 1122. He was then convicted of “assault with a deadly weapon . . . and of battery with serious bodily injury following a fight with his then-boyfriend.” *Id.* He was found to have been convicted of a particularly serious crime. “But the IJ further found that Konou was more likely than not to be tortured for his homosexuality if forced to return.” *Id.* On appeal, the BIA reversed “because it concluded that the Marshall Islands has no enforced prohibition on homosexuality,” relying on a Department of State Country Report. *Id.* Respondent then accepted his removal and has pursued this appeal therefrom. GILMAN.

CAT/More Likely Than Not, Not Found, Marshall Islands (2014). The court finds that “[t]he record regarding current public attitudes towards homosexuality in the Marshall Islands is less than clear.” *Id.* at 1124. However, the court was willing to defer to the administrative determination as supported by “substantial evidence.” *Id.* at 1123-24 (citing *Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011)).

CAT/Past Mistreatment. Notwithstanding the prior mistreatment respondent reported, the BIA was not required “to presume that Konou would be tortured again because of his own credible testimony.” *Id.* at 1125. The Circuit cites to the holding that “a State Department report on country conditions, standing alone, is not sufficient to rebut the presumption of future persecution when a petitioner has established past persecution.” *Id.* at 1126 (quoting *Molina-Estrada v. I.N.S.*, 293 F.3d 1089, 1096 (9th Cir. 2002)). But the “contexts” between asylum and CAT are “not interchangeable.” *Id.* In other words, while the past mistreatment must be considered, the assessment of the risk of “torture” must be forward-looking upon return.

Evidence/Reliance on Country Reports, Upheld. “The BIA was entitled to accord the Report substantial weight. . . . ‘U.S. Department of State country reports are the most appropriate and perhaps the best resource for information on political situations in foreign nations.’” *Id.* at 1125 (quoting *Sowe v. Mukasey*, 538 F.3d 1281, 1285 (9th Cir. 2008)).

Bars to Withholding/Particularly Serious Crime, Found (2014). In upholding the PSC finding, the Circuit noted the details of the nature of the crime as well as a “three-year sentencing enhancement” of the sentence due to the brutal nature of the attack. *Id.* at 1127. The court was not persuaded by the argument based on *United States v. Corona-Sanchez*, “for the proposition that an enhancement is not part of the sentence for the conviction.” *Id.* (citing 291 F.3d 1201 (9th Cir. 2002)). The Court found that there is an important difference in that “[n]ot all particularly serious crimes are aggravated felonies” notwithstanding the fact that “all aggravated felony

convictions are deemed to be particularly serious crimes.” *Id.* at 1127-28 (citations and internal quotation marks omitted). “In other words, just because a sentencing enhancement cannot be considered for the purpose of determining whether the crime is an aggravated felony does not imply that it cannot be considered for purposes of determining whether the crime is particularly serious.” *Id.* at 1128.

✕ ***Not Affirmed***

✕

Mexico

Chronology

- ✓ *Ramirez-Munoz v. Lynch*, 816 F.3d 1226, (9th Cir. 2016)
- ✓ *Bringas-Rodriguez v. Lynch*, 805 F.3d 1171 (9th Cir. 2015)
- ✗ *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015)
- ✗ *Maldonado v. Lynch*, 786 F.3d 1155 (9th Cir. 2015)
- ✓ *Perez-Palafox v. Holder*, 744 F.3d 1138 (9th Cir. 2014)
- ✗ *Tapia Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2013)
- ✓ *Mendoza-Alvarez v. Holder*, 714 F.3d 1161 (9th Cir. 2013)
- ✗ *Perez-Ramirez v. Holder*, 648 F.3d 953 (9th Cir. 2011)
- ✓ *Castro-Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011)
- ✓ *Gonzalez-Medina v. Holder*, 641 F.3d 333 (9th Cir. 2011)
- ✓ *Delgado-Ortiz v. Holder*, 600 F.3d 1148 (9th Cir. 2010)
- ✓ *Anaya-Ortiz v. Mukasey*, 594 F.3d 673 (9th Cir. 2010)
- ✓ *Velasco-Cervantes v. Holder*, 593 F.3d 975 (9th Cir. 2010)
- ✓ *Villegas v. Mukasey*, 523 F.3d 984 (9th Cir. 2008)
- ✓ *Lemus-Galvan v. Mukasey*, 518 F.3d 1081 (9th Cir. 2008)
- ✗ *Morales v. Gonzales*, 478 F.3d 972 (9th Cir. 2007)
- ✗ *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006)
- ✓ *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168 (9th Cir. 2006)
- ✗ *Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005)
- ✗ *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865 (9th Cir. 2003)
- ✗ *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001)
- ✗ *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000)

✓ Affirmed

- ✓ *Ramirez-Munoz v. Lynch*, 816 F.3d 1226, (9th Cir. 2016) ((b) (6)); denying a petition for review where the aliens failed to show that the Board's decision to deny their motion to reopen was an abuse of discretion. The Board had denied the aliens' fourth "motion to reopen their applications for asylum, withholding of removal, and deferral of removal under the [CAT]," finding that it was "time and number-barred because they failed to demonstrate prima facie eligibility for asylum based on changed country conditions." *Id.* at *1. The Circuit agreed with the BIA that, "although violent crimes appear to have increased since the prior motion to reopen, the evidence does not constitute changed circumstances such that any potential harm would be attributed to a statutorily-protected ground." *Id.* at *3. WALLACE.

Particular Social Group/Imputed Wealthy Americans, Mexico (2016). The aliens argued that their proposed group of "imputed wealthy Americans" was distinct from the group the Circuit

rejected in *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1152 (9th Cir. 2010). *Id.* at *1. The aliens argued that the characteristics of this group were “light-skinned, fit, and . . . American mannerisms or accents.” *Id.* The Circuit disagreed with the purported distinction with the group proposed in *Delgado-Ortiz*, reasoning that, although not explicitly stated, the persecutors’ likely motivation in *Delgado-Ortiz* was monetary gain. *See id.* at *2. The Circuit found that the aliens “provide[d] insufficient evidence to support their claim that their alleged American appearance will make them targets for violent crimes upon return to Mexico any more than the populace at large.” *Id.* First, the group did “not [consist of] a discrete class of persons recognized by society as a particular social group.” *Id.* (citing *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091 (9th Cir. 2013) (en banc). Second, the proposed group was insufficiently particular to render it distinct. *Id.* The country conditions evidence, which pointed to “troubling accounts of violence and kidnapping in Mexico,” did “not specifically show that violent individuals are targeting Americans or even wealthy individuals.” *Id.* at *3.

CAT/More Likely Than Not, Not Found, Mexico (2016). The Circuit found that the aliens did not show that “they are any more likely to be victims of violence and crimes than the populace as a whole in Mexico. . . .” *Id.* at *3.

- ✓ ***REHEARING EN BANC GRANTED, __ F.3d __, 2016 WL 3262628 (June 14, 2016)*** *Bringas-Rodriguez v. Lynch*, 805 F.3d 1171 (9th Cir. 2015) (b) (6); denying a petition for review where the applicant failed to show that the Mexican government was unable or unwilling to control his persecutors. The alien is an openly gay man living with HIV who suffered physical and sexual abuse as a child due to his homosexuality. *See id.* at 1175. He entered the United States in 2004 at age fourteen to escape his abusers, after having previously lived in Kansas for five months before returning to Mexico, where he faced more sexual abuse. *Id.* “He never reported the abuse to the police, believing such a complaint would be frivolous, and he did not tell his family until years later, fearing that his abusers would harm his mother or grandmother.” *Id.* The Circuit agreed with the BIA that, based on *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011), the alien had not satisfied his burden to prove the Mexican government’s unwillingness to control his persecutors. *Id.* at 1178. BYBEE. (Dissent by FLETCHER, disagreeing that *Castro-Martinez* foreclosed relief in this case).

Past Persecution/Failure to Report, Affirmed, Mexico (2015). Although an alien need not report abuse to the police to show that the government is unable or unwilling to control the persecutors, he “bears the burden to ‘fill in the gaps’ by showing how the government would have responded had he reported the abuse.” *Id.* at 1178 (citing *Castro-Martinez*, 674 F.3d at 1081). The country conditions evidence was insufficient because it did not mention any instances of persecution in the alien’s home state in Mexico and, indeed, “note[d] only one specific example of government persecution on the basis of sexual orientation in Mexico.” *Id.* at 1179 (emphasis omitted). Moreover, “negative social attitudes in one’s home country cannot form the basis for an asylum claim. If that was the case, LGBT Americans in many parts of this country, unfortunately, would have a valid claim to seek asylum in other parts of the world, including Mexico.” *Id.* at 1179 n.5 (citation omitted). The Circuit also agreed with the IJ that the alien’s allegations were not simply about LGBT discrimination – “they [we]re about child molestation.” *Id.* at 1182. The alien also “provided very few details about his friends’ negative experiences

with [reporting abuse to] police in [his home state in Mexico]." *Id.* at 1180. The Circuit stated that it was obvious that "[a] more detailed description should be afforded greater weight than a less detailed description, and hearsay statements with details that can be corroborated are more probative than hearsay statements that do not include any verifiable details." *Id.* at 1181. Because the alien's friends' bare hearsay statements were insufficient to overturn the BIA's conclusion that the Mexican government would be unwilling to control his persecutors, the Circuit held that he failed to establish past persecution. *Id.* at 1182.

Well-Founded Fear/Homosexuality, Affirmed, Mexico (2015). The Circuit held that *Castro-Martinez* foreclosed the argument that there is a pattern or practice of persecution of gay men in Mexico, and upheld the Board's determination that no pattern or practice of persecution for gay men in Mexico exists. *Id.* at 1182-83.

CAT/Past Mistreatment, Mexico (2015). "[T]he BIA is not required to 'presume that [an alien] would be tortured again because of his own credible testimony that he had been subjected to torture as a . . . child,' particularly when the factors that led to torture "'as a child would be less relevant to a self-sufficient homosexual adult.'" *Id.* at 1184 (quoting *Konou v. Holder*, 750 F.3d 1120, 1125 (9th Cir. 2014)). "The same evidence that supported the BIA's dismissal of the pattern-or-practice claim also supports the IJ's and BIA's conclusions that Bringas failed to establish a likelihood of torture: Conditions in Mexico are insufficiently dangerous for gay people to constitute a likelihood of government-initiated or -sanctioned torture." *Id.* (citing *Castro-Martinez*, 674 F.3d at 1082).

Motion to Remand/Denial, Mexico (2015). The Circuit found that the BIA did not abuse its discretion in denying a motion to remand where the alien did not provide a specific argument or country conditions evidence showing that his new HIV-positive status "change[d] the outcome of his case." *Id.* at 1185 (internal quotation marks omitted).

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- ✓ ***Perez-Palafox v. Holder*, 744 F.3d 1138 (9th Cir. 2014) (b) (6)**; upholding a denial of relief. The respondent had been convicted of Sale/Transportation of a Controlled Substance. The issue was whether this should be deemed to have been a particularly serious crime and thereby justify the reopening of a previous grant of withholding of removal by an IJ. The IJ had been reversed by the Board in finding not so, which had then ordered removal. RAWLINSON

Bars to Withholding/Particularly Serious Crime, Found (2014). The court upheld the Board's application of the *Frentescu* factors to so find. The conviction was found not to be "presumptively a particularly serious crime." 744 F.3d at 1141. This was apparently on the basis that the transportation could have been for the respondent's personal use. It was appropriate to apply the "case-by-case analysis articulated in *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007)." *Id.* This included information in a police report, which the IJ had refused to consider under *Morales v. Gonzales*, 478 F.3d 972, 982 (9th Cir. 2007). "*Anaya-Ortiz v. Holder*, 594 F.3d 673 (9th Cir. 2010) enlarged the scope of inquiry that the BIA could require IJs to pursue." ("All reliable information may be considered . . . including . . . information outside the confines of the record of conviction." 744 F.3d at 1141 (citing *id.* at 678.)). Factors that were found to support the Board's decision included that the respondent had been convicted on a drug trafficking statute, received a sentence of four years of imprisonment, and was associated with evidence to indicate an intent to traffic in drugs.

- ✓ *Mendoza-Alvarez v. Holder*, 714 F.3d 1161 (9th Cir. 2013); upholding a denial of withholding of removal and relief under the Convention Against Torture. Respondent is in very poor health and is an insulin-dependent diabetic. “Mendoza-Alvarez has been diagnosed as suffering from depression and posttraumatic stress disorder, in part due to his childhood with an alcoholic and abusive father.” 714 F.3d at 1163. An IJ “granted the request for withholding of removal under § 1231(b)(3)(A) based on Mendoza-Alvarez’s fear of persecution from the ‘cumulative threat to his survival from poverty and the limiting effects of his disabilities on his employability, access to housing, necessary life saving medications, and physical and mental health treatment.’” *Id.* at 1164. The request for asylum was found to be time-barred and was not appealed. On appeal, the BIA reversed, finding that the social group Mendoza proposed, “insulin-dependent persons with mental-health problems, including posttraumatic stress and depressive disorders . . . was not ‘particular’ as the statute requires . . . [and] the record did not show a clear probability of persecution because of membership in a particular social group.” *Id.* at 1163. This was a REAL ID case. PER CURIAM.⁴⁶

Particular Social Group/Health. The Circuit agreed with the Board’s assessment that “none of the social groups Mendoza-Alvarez identified is particular. The particularity requirement looks to ‘whether a group’s boundaries are so amorphous that’ it cannot be considered a social group.” *Id.* at 1164 (quoting *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091 (9th Cir. 2013) (*en banc*)). “Many individuals in Mexico have serious chronic health problems, including insulin-dependent diabetes or mental illness. . . . the Mexican government does not provide [medications, including insulin] for free. . . . Individuals who need but cannot obtain life-sustaining medication, including insulin, because of poverty, inability to work, or lack of insurance are far from a particular, discrete social group. *See Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (“Populations whose only common characteristic is their low economic status do not form a social group for asylum purposes.”).” 714 F.3d at 1164. The Circuit cites to *Santos-Lemus v. Mukasey*, 542 F.3d 738, 745-46 (9th Cir. 2008) for holding that “young men in El Salvador resisting gang violence, is too loosely defined to meet the requirement for particularity,” as well as to *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576-77 (9th Cir. 1986) for holding that “‘young, working class, urban males of military age’ is not a particular social group because

⁴⁶ In a case which acquired significant national interest, a German family requested asylum on the basis of risks they faced for wanting to educate their children at home “largely for religious reasons.” *Romeike v. Holder*, 718 F.3d 528, 528 (6th Cir. 2013). Even assuming that “faith-based homeschoolers (or for that matter homeschoolers in general) are a cognizable social group”. . . homeschoolers are [not] more severely punished than others whose children do not comply with the compulsory school attendance law.” *Id.* at 532. The Sixth Circuit approved the Board’s determination which had reversed that of the IJ: “There is no indication . . . that the German officials ‘are motivated by anything other than law enforcement. These factors reflect appropriate administration of the law, not persecution.” *Id.* at 533. “Congress might have written the immigration laws to grant a safe haven to people living elsewhere in the world who face government strictures that the U S constitution prohibits. But it did not.” *Id.* at 530. The fact that Germany adopted the compulsory attendance law in 1938 and that it was “driven by animus towards faith based homeschoolers;” or, the argument that “Germany applied the law selectively to homeschoolers” were not sufficient to justify relief. *Id.* at 533.

'[i]ndividuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings.'" 714 F.3d at 1164 n.1.

Nexus/Central Reason, Post REAL ID, Affirmed, Mexico (2013). "If someone suffers harm on grounds that are associated with group membership but also apply to many others, then the harm is not because of membership in a particular social group and there is no basis to conclude that the group members were intentionally targeted. As the BIA and the courts have recognized, an inadequate healthcare system is not persecution and is not harm inflicted because of membership in a particular social group." *Id.* at 1165. Five supporting cases are cited, including *Castro-Martinez v. Holder*, 674 F.3d 1073, 1082 (9th Cir. 2011), "finding that a homosexual asylum applicant had not demonstrated persecution because a 'lack of access to HIV drugs is a problem suffered not only by homosexuals but by the Mexican population as a whole.'" *Id.* at 1165 n.2.

- ✓ *Castro-Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011), *superseded on reh'g en banc denied*, 674 F.3d 1073 (9th Cir. 2011) ^{(b) (6)}; affirming denial of relief. Respondent is gay and HIV positive and credibility was not at issues. "When he was between six and ten years old, he was raped brutally and repeatedly by two male teenagers." 674 F.3d at 1079. He did not report this abuse because he felt it would be ineffective or unreasonably dangerous, given the way gay people are perceived in Mexico and the lack of police interest. His fear of return was based on death, "in a slow and torturous way for not having the medication that I need." *Id.* With regard to his well-founded fear, "Castro submitted country reports documenting societal discrimination against homosexuals in Mexico and attacks on gay men . . . [and] he believes HIV medication is not available for gays in Mexico due to discrimination." *Id.* "The IJ pointed to country reports in the record indicating that Mexican law prohibits discrimination on the basis of sexual orientation and that the Mexican government has made successful efforts to promote tolerance of homosexuals." *Id.* CLIFTON

Past Persecution/Failure to Report, Affirmed, Mexico (2011). "Castro's primary reason for not contacting the authorities was that he believed the police would not have helped him. However, such a statement, without more, is not sufficient to fill the gaps in the record regarding how the Mexican government would have responded had Castro reported his attacks." *Id.* at 1081.

Well-Founded Fear/Homosexuality, Affirmed, Mexico (2011). "To establish that his fear of persecution was objectively reasonable, Castro could have demonstrated that he was a member of a disfavored group against which there was a systematic pattern or practice of persecution, or that he was singled out for persecution. *Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009). As to the latter, Castro did not argue that any government actor had singled him out for persecution. As to the former, Castro cited evidence of societal discrimination against gays in Mexico, and attacks on gay men committed both by private parties and the police, to argue that the Mexican government systematically harmed gay men and failed to protect them from violence. The record did not compel this conclusion, however, particularly in light of recent country reports ... Mexican law prohibits several types of discrimination, including bias based on sexuality, and it requires federal agencies to promote tolerance." 674 F.3d at 1082. Moreover, the circuit found that substantial evidence supported the BIA's conclusion that "lack of access to

HIV drugs is a problem suffered not only by homosexuals but by the Mexican population as a whole.” *Id.* The circuit also reiterated that “‘generalized economic disadvantage’ does not rise to the level of persecution.” *Id.* (citing *Raass v. INS*, 692 F.2d 596 (9th Cir. 1982)).

- ✓ ***Gonzalez-Medina v. Holder*, 641 F.3d 333 (9th Cir. 2011)** (b) (6); affirming a denial of relief to a woman who had suffered from domestic violence, at the hands of her husband, in the United States but not in Mexico. Her husband had been deported back to Mexico. Notwithstanding threats made to her, relief was denied both in terms of asylum as the application was deemed time barred as well as for withholding of removal relief and under CAT. The decision rejects an equal protection challenge to the one year filing requirement. Credibility was not at issue. MCKEOWN.

Bars to Asylum/One Year Bar, Found, Mexico (2011). “Even if her husband’s return to Mexico was a changed circumstance, Gonzalez–Medina did not file her application within a reasonable period of time following the change—she filed it seventeen months after his deportation.” *Id.* at 336 n.1.

Past Persecution/Country of Persecution. The circuit approved of 8 CFR 1208.16(b)(1)(i): “past persecution must have occurred ‘in the proposed country of removal.’” *Id.* at 337.

Changed Country Conditions/Internal Relocation Possible, Mexico (2011); Changed Conditions Found, Mexico (2011). Notwithstanding the respondent’s expressed fear of her husband and the extreme violence of the acts he committed against her in the United States, the circuit found such to be “insufficient to meet [her] burden of proof.” *Id.* at 338. She had “not been in touch with her husband except once via telephone since he was deported, and she offers no evidence of substance on the relocation issue. [Her] parents and nine siblings live in Mexico and her parents have many years of experience helping domestic violence victims, including finding shelter for victims who have left their abusers.” *Id.*

- ✓ ***Delgado-Ortiz v. Holder*, 600 F.3d 1148 (9th Cir. 2010)** (b) (6); upholding a denial of a motion to reopen to pursue an I-589 on the premise that the movants “belong to a particular social group: Mexicans returning home from the U.S. who are targeted as victims of violent crime as a result.” The movants had submitted various documents pertaining to criminal violence in Mexico as well as an “attack” on a relative and a break-in at another relative’s house. PER CURIUM.

Motion to Reopen/Disfavored. “Motion to reopen are disfavored due to the ‘strong public interest in bringing litigation to a close. . . . They are particularly disfavored in immigration proceedings where ‘every delay works to the advantage of the deportable alien who wishes merely to remain in the U.S.’ (Three supporting citations omitted).

Persecution/Generalized Violence, Mexico (2010). “Asylum is not available to victims of indiscriminate violence, unless they are singled out on account of a protected ground,” citing *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001).

Particular Social Group/Returning from the United States. “We have held that the key to establishing a PSG is ensuring that the group is narrowly defined . . . [and we look to] various factors such as immutability, cohesiveness, homogeneity, and visibility.” The circuit rejected the

proposed group, finding that “individuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, varying interests, diverse cultures and contrary political leanings,” citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005) (rejecting the group “business owners in Colombia who had rejected demands by narcotics traffickers to participate in illegal narcotics activity”); *Donchev v. Mukasey*, 553 F.3d 1206, 1220 (9th Cir. 2009) (rejecting the group “friends of Roma individuals or of the Roma generally”); and *Santos-Lemus v. Mukasey*, 542 F.3d 738, 745-46 (9th Cir. 2008) (rejecting the group “young men in El Salvador resisting gang violence”).

- ✓ *Anaya-Ortiz v. Mukasey*, 594 F.3d 673 (9th Cir. 2010) (b) (6); granting a motion for rehearing, issuing a superceding opinion and denying any further motion for rehearing. The circuit upheld a denial of relief to an individual who had been convicted of an aggravated felony. The new opinion struck the previous language with regard to upholding the aggravated felony charge and dealt with that issue in a now-unpublished decision. The new published decision deals only with whether the respondent had been convicted of a particularly serious crime, thereby becoming ineligible as a matter of law for both asylum and withholding of removal. The administrative decision relied upon a portion of respondent’s testimony: “Anaya drove into a house while driving drunk. The collision caused part of the house’s sheetrock wall to collapse on an elderly woman who lived inside causing injuries to her shoulder and leg.” IKUTA; BERZON, concurring in part and dissenting in part.

Bars to Asylum/Particularly Serious Crime, Found, Mexico (2010). The court accepted the Board’s decision in *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007).⁴⁷ The court further found that *Morales v. Gonzales*, 478 F.3d 972, 981 (9th Cir. 2007) had thereby been limited in terms of the IJ now being able to consider other evidence outside of the strict record of conviction. Here, the testimony by the respondent, although outside the record of conviction, was found to be “reliable” in relating his conduct. It could therefore be considered in making a particularly serious crime determination. Regarding the drunk driving conviction, the court found it reasonable to so hold: “the respondent after drinking alcohol to the point where he was intoxicated, began driving a motor vehicle in reckless disregard for persons or property whereupon he drove his car into the home of his victim causing property damage and bodily injury, and . . . was confined for his criminal actions.” The court’s decision makes only one brief reference to *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009). There, the amended decision found that the respondent had not been convicted of a particularly serious crime notwithstanding his 3 felony DUI convictions, one of which involved an injury accident. The Delgado court found an “abuse of discretion” with regard to the PSC finding. The decisions may be harmonized in the sense that the Ninth Circuit will continue to review the PSC decision under the abuse of discretion standard. This was not triggered in Anaya, as he was deemed to have been convicted of an aggravated felony, and discretion does not figure into the decision to grant withholding of removal which is the most that Anaya could be provided with.

⁴⁷ *Matter of N-A-M-*, was upheld on direct appeal in *N-A-M v. Holder*, 587 F.3d 1052 (10th Cir. 2009).

✓ ***OVERRULED BY *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013).***

Velasco-Cervantes v. Holder, 593 F.3d 975 (9th Cir. 2010) ((b) (6)); affirming a denial of relief based upon a particular social group claim. Respondent asserted that she was a member of a particular social group as she “was forced to serve as a material witness on behalf of the U.S. against illegal smugglers.” She claims that she had been “threatened” and “narrowly avoided being raped.” The smugglers made repeated threats to other members of her family that they would kill them as well if she testified. Credibility was not at issue. BEEZER.

REAL ID Act/Reliance on Prior Case Law. Although this case was clearly considered under the REAL ID Act, the court makes no reference to the statute and relies upon authorities decided prior thereto.

Particular Social Group/Informant, Mexico (2010). In denying the claim, the circuit held that “former government material witnesses cannot be defined with ‘sufficient particularity,’” citing *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007); *Soriano v. Holder*, 569 F.3d 1162, 1169 (9th Cir. 2009) (a “government informant” is not a member of a PSG for purposes of asylum”).

✓ *Villegas v. Mukasey*, 523 F.3d 984 (9th Cir. 2008) ((b) (6)); affirming a denial of relief of a CAT claim. The respondent had been convicted of second degree robbery. He had a long documented history of psychiatric illness. He was on multiple medications. The IJ found him credible, but that he had been convicted of a particularly serious crime (PSC). Asylum and withholding of removal were denied on that basis. The court found it did not have jurisdiction to review the IJ’s finding that the conviction was a PSC. The court upheld the denial of relief under CAT even though the respondent, if removed, would be sent to a mental institution in Mexico where “conditions were deplorable.” (at 986). HALL.

CAT/Intent to Inflict Harm. In order to establish a successful claim, there must be sufficient evidence to demonstrate “specific intent to inflict harm.” (at 985). The court distinguished *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003). There, in finding the alien eligible for CAT relief, the court held that “for a government official to acquiesce in acts of torture by a private party...the public official need not have actual knowledge of or willfully accept the torture...Rather, ‘acquiescence’ requires only that a public official have an awareness of the private torture which includes willful blindness to the act.” (at 989). In other words, “a petitioner must show that severe pain or suffering was specifically intended- that is, that the actor intend the actual consequences of his conduct as distinguished from the act that causes those consequences.” *Id.* Because there was no demonstration that anyone “created the conditions for the specific purpose of inflicting suffering upon the patients” in the mental institution, the claims must fail. *Id.*

✓ *Lemus-Galvan v. Mukasey*, 518 F.3d 1081 (9th Cir. 2008); affirming a denial of relief. The court upheld a denial of relief to an aggravated felon on the basis that he “could safely relocate to another place in Mexico.” (at 1083). He testified: “[H]e would be tortured by the Pimental family, a drug cartel that had been involved in a violent turf war with members of [respondent’s] family in the northern border regions of Mexico.” *Id.* There was no

analysis to support this assessment. The discussion mostly justified the court's finding that it had jurisdiction to hear the claim. MCKEOWN.

- ✓ *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168 (9th Cir. 2006) ((b) (6)); affirming a denial of a "motion to reinstate his asylum application"; WALLACE.

Asylum Application/Reinstatement. The respondent sought asylum as well as cancellation of removal. The IJ held that the respondent was not eligible for cancellation of removal. The respondent sought to reinstate his asylum application. This was denied and the BIA affirmed. On first appeal, 340 F.3d 865 (9th Cir. 2003), the panel held, "the Board did not abuse its discretion by requiring [Mendez-Gutierrez] to show prima facie eligibility for asylum before reopening his application." To the extent that the respondent failed to show past persecution, this was upheld. The panel remanded with regard to the claim of "future persecution." Upon remand the Board found that Mendez-Gutierrez still had not met his burden and to the extent that he raised other new issues, such "were beyond the scope of the court's remand." The panel sustained the Board's second decision.

Persecution/Harassment, Mexico (2006); Well-Founded Fear/Objectively Reasonable, Not Found, Mexico (2006). The respondent asserted that he had been "harassed and threatened by federal police because of his political affiliation. He expressed fear of death if he had to return to Mexico and stated that he had been "interrogated... and taken to a desolate place." He asserted that he was a member of the PAN. The panel noted that the PAN won the 2000 elections and remains in power currently. The panel characterized the respondent's claim as "vague and conclusory" and "clearly insufficient."

Board of Immigration Appeals/Limited to Remand Order. "The Board like the district court has no power to extend our remand beyond the boundary ordered by our court."

✗ *Not Affirmed*

- ✗ *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015) ((b) (6)); remanding to the BIA to grant the deferral of removal claim. The Circuit held that the BIA was within its discretion to deny withholding of removal based on the alien's conviction for a particularly serious crime. *Id.* at 1075. However, the Circuit held that the Board erred in denying deferral of removal under CAT because it incorrectly conflated gender identity and sexual orientation. *Id.* The alien, a transgender woman, experienced abuse throughout her childhood for being feminine and, according to her abusers, gay. *Id.* at 1075-76. She had been living openly as a woman since 2005, approximately five years after unlawfully entering the United States. *Id.* at 1076. After she was removed to Mexico in 2007, she "again faced harassment from her family and members of the local community because of her gender identity and perceived sexual orientation." *Id.* In addition, she was assaulted, beaten, raped, and threatened on one occasion by four armed uniformed police officers, who shouted homophobic slurs during their attack. *Id.* On another occasion a few days later, when the alien was attempting to cross the border with a group of migrants, several uniformed Mexican military officers called her a homophobic slur, separated her from the

group, and “forced her to perform oral sex on [one of the officers] while the rest of the group watched and laughed.” *Id.* at 1076-77. These incidents rose to the level of torture and occurred “because of her transgender identity and her presumed sexual orientation”; additionally, two assaults were by Mexican officials. *Id.* at 1079. Because the Circuit found that the Board’s denial was “based on its factual confusion as to what constitutes transgender identity” as well as its failure to find that there was substantial evidence of past torture and a substantial danger of future torture, the Circuit held that the alien was “entitled to a grant of CAT relief on remand.” *Id.* at 1082. NGUYEN.

CAT/Transgender, Mexico (2015). The Circuit emphasized the difference between gender identity and sexual orientation. For example, Mexico has laws recognizing same-sex marriage, but these “may do little to protect a transgender woman . . . from discrimination, police harassment, and violent attacks in daily life.” *Id.* at 1080. The “[c]ountry conditions evidence show[ed] that police specifically target the transgender community for extortion and sexual favors” and that “Mexico has one of the highest documented number of transgender murders in the world.” *Id.* at 1081. The alien, a transgender woman who lives openly as a woman, was deemed to be “a conspicuous target for harassment and abuse.” *Id.* The Circuit further noted that her experiences in Mexico “reflect[ed] how transgender persons are caught in the crosshairs of both generalized homophobia and transgender-specific violence and discrimination.” *Id.*

- ✱ *Maldonado v. Lynch*, 786 F.3d 1155 (9th Cir. 2015) (en banc) (b) (6); remanding to the BIA for reconsideration of the deferral of removal claim. Although the IJ found Maldonado credible, he denied Maldonado’s application for deferral of removal under CAT because Maldonado could safely relocate in Mexico. *Id.* at 1159. The BIA affirmed and stated that Maldonado “failed to establish that internal relocation within Mexico was impossible.” *Id.* (internal quotation marks omitted). Before reaching the merits, the Circuit determined that the case was not moot, since Maldonado had not fled from custody and had complied with his removal order. *Id.* at 1161. PAEZ. (Dissent by GOULD, stating that the case was moot since Maldonado was neither present in court nor in touch with the attorney). (Dissent by M. SMITH, agreeing with Judge Gould that the case was moot, but stating that even if there were a justiciable controversy, he would affirm the BIA’s decision denying relief under CAT).

CAT/Internal Relocation, Not Affirmed, Mexico (2015). The Circuit held that “[t]he regulations governing CAT deferral, unlike the asylum regulation[s], do not call for any burden shifting.” *Id.* at 1163. Accordingly, 8 C.F.R. § 1208.16(c)(2) “does not place a burden on an applicant to demonstrate that relocation within the proposed country of removal is impossible because the IJ must consider all relevant evidence; no one factor is determinative.” *Id.* at 1164. The DHS does not bear the burden of proof as to relocation either, since “the applicant carries the overall burden of proof.” *Id.* The Circuit overruled *Hasan v. Ashcroft*, 380 F.3d 1114 (9th Cir. 2004), *Lemus-Galvan v. Mukasey*, 518 F.3d 1081 (9th Cir. 2008), and *Singh v. Gonzales*, 429 F.3d 1100 (9th Cir. 2006), as those cases placed the burden on the applicant. *Id.*

- ✱ *Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2013); reversing and remanding a denial of relief to a former Mexican soldier. He had been involved in the country's efforts to control drug distribution. He suffered significant physical harm, kidnapping, a drive-by shooting, and menacing threats after he assisted in the transferring of major drug traffickers who had come into police custody. They had been arrested, were filmed, and in doing so, "[t]he national broadcast provided a clear view of Tapia Madrigal's face." 716 F.3d at 502. Credibility was not at issue. The key issue was whether Respondent should be deemed a member of a cognizable particular social group. The harms he experienced occurred both before and after he left military service. FISHER.

Particular Social Group/Active Military Service. The Circuit accepted the denial of relief on the proposed social group of active duty military members. However, the Circuit "consider[ed] these incidents to the extent they inform[ed the] analysis of the mistreatment he suffered after leaving the military." *Id.* at 504.

Past Persecution/Found, Mexico (2013). The Circuit reversed the administrative determination that past persecution had not been established. This determination had been based on the finding that there was no evidence that Los Zetas were responsible. The Board was faulted "reach[ing] this conclusion by viewing each incident in isolation, instead of examining the totality of the circumstances." *Id.*

Nexus/Central Reason, Post REAL ID, Not Affirmed, Mexico (2013). The Circuit did accept the administrative position that "he has not established a nexus between his persecution and an imputed political opinion." *Id.* at 505. The Circuit recognized the viability of his social group, "former Mexican army soldiers who participated in anti-drug activity." *Id.* The Circuit did not accept the argument that the actions taken against Respondent was personal "'retribution' for actions he took while in the military. . . . if a retributory motive exists alongside a protected motive, an applicant need show only that a protected ground is 'one central reason' for his persecution." *Id.* at 506.

Unable or Unwilling to Control/Gangs. The Circuit found that the Board "appears to have considered only the Mexican government's willingness to control Los Zetas and not its ability to do so." *Id.* at 507. It found that there was "significant evidence in the record [that] calls into doubt the Mexican government's ability to control Los Zetas" and remanded for consideration of this question in the first instance. *Id.* at 506.

CAT/Acquiescence, Not Affirmed, Mexico (2013). "Acquiescence of a public official requires that the public official . . . have 'awareness' of the torturous activity, [but] he need not have actual knowledge of the specific incident of torture. . . . [or] approve of the torture, even implicitly." *Id.* at 509. "[A]n applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in his torture. He need show only that 'a public official' would so acquiesce." *Id.* This can be demonstrated by "evidence in the record explain[ing] that corruption of public officials in Mexico remains a problem, particularly at the state and local levels of government, with police officers and prison guards frequently working directly on behalf of drug cartels." *Id.* at 510.

- ✱ *Perez-Ramirez v. Holder*, 648 F.3d 953 (9th Cir. 2011) ((b) (6)); reversing a denial of relief to a whistle-blower who suffered physical violence and other harassment due to his activities to deter government corruption. This is a pre-REAL ID Act case. The circuit did

not discuss the BIA's holding in *Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011), which discussed whistle-blower cases. Credibility was not at issue. The basis of the denial was that "he did not report the corruption to an outside agency." (At 956). HUG.

Political Opinion/Whistleblowing, Not Affirmed, Mexico (2011). "The individual is 'not required to expose governmental corruption to the public at large' or an outside agency in order to qualify as a whistleblower for the purposes of asylum." (quoting *Fedunyak v. Gonzalez*, 477 F.3d 1126, 1129 (9th Cir. 2007)). It would suffice that the exposure was "to his supervisor . . . and his refusal to accede to . . . corrupt demands." (At 957).

CAT/Internal Relocation, Not Affirmed, Mexico (2011). "[T]he BIA improperly placed the burden on petitioner to show that he could not relocate within Mexico and failed to apply the presumption of a nationwide threat." (At 958) (citing *Nuru v. Gonzalez*, 404 F.3d 1207, 1219 (9th Cir. 2005); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003)).

- ✱ ***Morales v. Gonzales*, 478 F.3d 972 (9th Cir. 2007);** remanding a case involving a claim of a transsexual who asserted she had been significantly mistreated in her prior gender as a male. The respondent had been convicted of communicating with a minor for immoral purposes. The assessment that this conviction was for a particularly serious crime (PSC) and hence a bar to eligibility for both asylum and withholding of removal was reversed. The denial of relief under CAT was also reversed. This case is a significant extension of *Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006). There, the respondent had been convicted of an aggravated felony. In both cases, the court held that the agency below had not properly applied the factors set forth in *Matter of Frentescu*, 18 I & N Dec. 244 (BIA 1982) when making the PSC determination. THOMPSON.

Bars to Asylum/Particularly Serious Crime, Not Found, Mexico (2007). The respondent argued that the conviction should not be deemed a CIMT. Her argument was rejected in that: "The full range of conduct prohibited by [the relevant statute] categorically constitutes a crime involving moral turpitude." The respondent had been accused of child molestation as well as rape, but she was convicted after jury trial of the crime of communicating with a minor for immoral purposes. The court held that the Immigration Judge erred by relying on the detailed factual assessment of the sexual misconduct with two boys, aged 15 and 14, set out by the Washington Court of Appeals in its decision affirming the sufficiency of the evidence. The court held: "The same record of conviction is used in making both the aggravated felony and the PSC determinations." The Washington state appellate decision was not included within that record.⁴⁸

CAT/Acquiescence, Not Affirmed, Mexico (2007). The court restated the holdings of *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 787-88 and *Zheng v. Ashcroft*, 332 F.3d 1186, 1194-95 (9th Cir. 2003)

⁴⁸ The decision is undermined by *Delgado v. Mukasey*, 546 F.3d 1017 (9th Cir. 2008), where an individual had not been convicted of an aggravated felony nor a CIMT. He had been convicted three times of drunk driving, including one for injury accident. The court would not disturb the finding that respondent had been convicted of a particularly serious crime. The majority made the effort to distinguish *Morales* on the basis that the "wrong facts" had been relied upon, i.e. going outside the strict record of conviction which was found to be reviewable.

that there need not be any “direct government action.” Under the court’s view of “willful blindness” or “willful acceptance,” it would appear a governmental officer’s awareness or involvement in an individual’s significant physical mistreatment, even from many years ago, meets the requirement of 8 C.F.R. § 208.18(a)(1) that the torture be done at the “consent or acquiescence of a public official.”

CAT/More Likely Than Not, Found, Mexico (2007). The court granted CAT relief on the basis of the respondent’s claim of incidents prior to 1986 when she was of a male gender, even though the case was presented to the IJ in 2004, almost twenty years after the physical abuse. The court granted relief on the basis of this prior history, without reference to the requirement of future risk under the regulations, notwithstanding the fact that the respondent had twice returned to Mexico without incident and had supportive family members remaining there.

- ✱ ***Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006)** (b) (6); A gay male with a “female sexual identity” reported ongoing acts of violence and harassment against him including a rape by his cousins. Much of the violence was at the hands of his family relatives. The court remanded finding that the Board “applied the wrong legal standard.” BROWNING. There was a lengthy dissent by O’SANNLAIN. In particular, he noted that the incidents occurred a number of years ago, the respondent was now an adult, conditions for gay Mexicans are not nearly as bad as claimed, and the majority improperly extended Ninth Circuit case law.

Unable or Unwilling to Control/Reporting Not Required, Not Affirmed, Mexico (2006). The Board found that the respondent’s background materials on problems experienced by gay people in Mexico “described only general police abuse” and were “inconclusive.” The background materials, coupled with the failure to seek the assistance of the police led the Board to conclude that respondent did not prove “that the Mexican government is unwilling or unable to control those who harmed or may harm him.” The court held that an applicant “need not have reported [his] persecution to the authorities if he can convincingly establish that doing so would have been futile or have subjected him to further abuse,” and remanded to the Board to apply this legal standard.

CAT/Acquiescence, Not Affirmed, Mexico (2006). There is no need to show “that public officials must be informed of the alleged torture. The Board applied the wrong standard when it required evidence to “establish that the government ‘sanctioned’ his torture” The court cited to *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003), that in terms of government “acquiescence,” (8 C.F.R. § 208.18(a)(1)), the respondent only need show that public officials “would turn a blind eye to torture.” The assertion that the standard set forth in *Matter of J-E-*, 23 I & N Dec. 291 (BIA 2002), that the public official would need to have had “custody or physical control of him” to establish the CAT claim was rejected.

- ✱ ***Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005)** (b) (6); The sexual abuse and death threat that the citizen of Mexico received from a police officer constituted past persecution. This notwithstanding the alien’s particular problems occurring in a small town, that he subsequently moved to a large city, and did not report any further problems other than that his life “remained difficult.” After a first departure from Mexico to the

U.S., he went back and forth between the countries. The IJ had found that the assault stemmed from a “personal problem” and that the alien had not reported the assault to law enforcement authorities. The court reaffirmed the holdings of *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. Mar. 7, 2005), that, “alien homosexuals constitute a particular social group” and *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000), that, “death threats alone can constitute persecution.” The IJ had characterized the alien as “a low profile non-transvestite gay man who has never been openly identified as a homosexual except by the one police officer” who actually perpetrated the physical violence and made the threat. The IJ denied relief because, “there is no evidence of systematic official persecution of homosexuals,” found “relocation was possible,” and found that the alien’s “fear of persecution is completely alleviated by his repeated voluntary return trips to Mexico.” D.W. NELSON.

Changed Country Conditions/Changed Conditions Not Found, Mexico (2005). The court relied on particular comments in the record from not only the Department of State but also from private groups to find that sufficient problems remained so as not to accept this holding.

Changed Country Conditions/Internal Relocation Not Possible, Mexico (2005); Changed Conditions Not Found, Mexico (2005). The court ruled that this would not be a reasonable option given “social and cultural constraints.” *Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003), as well as his own health problems related to his having AIDS.

Well-Founded Fear/Return Trips, Not Affirmed. “We have never held that the existence of return trips standing alone can rebut” the presumption that past persecution justifies relief.

CAT/Burden of Proof, Not Met. Notwithstanding all of the above and finding explicit eligibility for both asylum and withholding of removal, the denial of the CAT claim was upheld on the basis of the failure to meet the burden of proof.

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- * *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865 (9th Cir. 2003) ((b) (6)); remanding for consideration of merits of asylum claim before BIA can deny request for reinstatement of asylum application; FISHER.

Asylum Application/Reinstatement. Fact that no statute or regulation specifically governed reinstatement of a voluntarily withdrawn asylum application did not preclude Court of Appeals from exercising jurisdiction to review BIA’s denial of alien’s request to reinstate his voluntarily withdrawn application; request for reinstatement was analogous, at least to some degree, to a motion to reopen, which was governed by a clear set of rules and regulations. “Although it appears doubtful that [alien] will be able to establish a well-founded fear of future persecution, given the PRI’s loss of the Mexican presidency to PAN member Vincente Fox in 2000, we note that the political climate in Mexico is fluid.” (at 870).

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- * *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001) (*opinion vacated on reh’g en banc*, 273 F.3d 1220 (9th Cir. 2001) and remanded for a stipulated reopening) ((b) (6)); vacated opinion held that: (1) applicant exhausted remedies with respect to argument she was persecuted on account of her membership in her immediate family; (2) family group could qualify as “particular social group” within meaning of asylum statute; (3)

applicant's immediate family was "particular social group"; (4) persecution of applicant was "on account of" membership in such group; (5) Mexican government was unable or unwilling to control abusive behavior inflicted on applicant by father; and (6) that applicant was now 19 years old was insufficient to rebut presumption that she had well-founded fear of future persecution.

- ✱ *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (b) (6)); granting withholding and remanding for a discretionary grant of asylum; (1) gay men with female sexual identities in Mexico comprised particular social group for purposes of asylum statute; (2) applicant was member of such group; and (3) sexual assaults on applicant by police officers were "on account of" his membership in such group; TASHIMA; (BRUNETTI, concurring, disagreed with the broad reasoning and rationale of the majority).

Particular Social Group/Transgender or Transsexual. Applicant's membership in a social group of gay men with female sexual identities constituted "membership in a particular social group" ; the fact that applicant suffered persecution rather than change indicated that his sexual identity was fundamental, and he gave credible, uncontradicted testimony about the inherent and immutable nature of his sexual identity.

Nexus/Motive Found, Pre REAL ID, Mexico (2000). Sexual assaults on the applicant by police officers were "on account of" his membership in particular social group; an expert in Latin American history and culture testified that gay men with female sexual identities were recognized in Mexico as a distinct and readily identifiable group and were persecuted; police would attack and rape men with female sexual identities.

Past Persecution/Failure to Rebut, Mexico (2000). INS failed to overcome presumption of future persecution that arose when asylum applicant established past persecution by police on account of his membership in social group of gay men with female sexual identities in Mexico; INS presented no evidence that Mexico had taken effective steps to curb sexual orientation-based violence, and expert testified that situation for gay men in Mexico had worsened because of decline of economy.

Unable or Unwilling to Control/Police Protection, Failure to Seek. The fact that respondent did not seek the assistance of law enforcement authorities does not defeat the claim. Respondent asserted persecution at the hands of the police, the "very agency which purports to protect him by law." 225 F.3d at 1097.

Mongolia

Chronology

- ✓ *Lkhagvasuren v. Lynch*, 828 F.3d 1080, 2016 (9th Cir. July 13, 2016), *amended Lkhagvasuren v. Lynch*, No. 13-71778 (9th Cir. Dec. 30, 2016)
- ✗ *Javhlan v. Holder*, 626 F.3d 1119 (9th Cir. 2010) (withdrawn and sealed on March 29, 2011)

✓ *Affirmed*

- ✓ *Lkhagvasuren v. Lynch*, 828 F.3d 1080, (9th Cir. 2016), *amended Lkhagvasuren v. Lynch*, No. 13-71778 (9th Cir. Dec. 30, 2016) (b) (6); denying a petition for review because the alien did not demonstrate that the persecution occurred on account of a protected ground. The alien was a whistleblower against his former employer, “an alcoholic-beverage company that he believed was engaged in corrupt activities.” *Id.* at *1. However, the alien failed to “allege or prove any actual government connection to his former employer’s scandalous business practices of selling poisonous alcohol, which were later publicly opposed by the government.” *Id.* at *2. He also failed to show that the harm inflicted upon him involved acquiescence by government officials. *Id.* The Circuit also found it “unlikely that Lkhagvasuren would face torture at the hands of the government if returned to Mongolia . . . [because there was] substantial evidence that the government publicly opposed the private corruption Lkhagvasuren sought to expose . . .” *Id.* PER CURIAM.

Political Opinion/Whistleblowing, Affirmed, Mongolia (2016). “Whistleblowing ‘may constitute political activity sufficient to form the basis of persecution’ where petitioner’s whistle blew against corrupt government officials, and he was targeted for persecution on account of that political opinion, whether actual or imputed. *Id.* at *1. (citing *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000); *Sagaydak v. Gonzales*, 405 F.3d 1035, 1042 (9th Cir. 2005)). The Circuit “adopt[ed] the analytical framework of *Matter of N-M-* for the purpose of identifying whether an applicant has established the required factual nexus between any purported political whistleblowing and actual persecution . . .” *Id.* at *2. (citing *Grava*, 205 F.3d at 1181). The three factor standard in *Matter of N-M-* involves identifying: “(1) ‘whether and to what extent the alien engaged in activities that could be perceived as expressions of anticorruption beliefs;’ (2) ‘any direct or circumstantial evidence that the alleged persecutor was motivated by the alien’s perceived or actual anticorruption beliefs;’ and (3) ‘evidence regarding the pervasiveness of government corruption, as well as whether there are direct ties between the corrupt elements and higher level officials.’” *Id.* (citing *Matter of N-M-*, 25 I&N Dec. 526, 532-33 (BIA 2011)).

Amended; The opinion now assumes the applicability of *Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011) without explicitly adopting the analytical framework. So, the framework established in *Matter of N-M-* is still applicable to cases arising in the Ninth Circuit but is now left open to challenges by appellants. Essentially, the opinion no longer explicitly adopts the analytical framework of *Matter of N-M-*, but “assume[s] without deciding” that *Matter of N-M-* may be

applied to identify whether an applicant has established nexus between political whistleblowing and persecution. With the amendment, the petition for rehearing en banc was denied.

✕ ***Not Affirmed***

- ✕ ***Javhlan v. Holder*, 626 F.3d 1119 (9th Cir. 2010) (withdrawn)** (b) (6); The opinion and dissent filed December 3, 2010, slip op. 19277, appearing at 626 F.3d 1119 (9th Cir. 2010), were withdrawn on March 29, 2011. The opinion may not be cited as precedent by or to the Ninth Circuit or any district court of the Ninth Circuit. The opinion should be removed from all publications. The case was sealed by order of the Ninth Circuit in Order No. 06-71565 and is now referred to as *Doe v. Holder*.

Morocco

Chronology

- ✓ *Chebchoub v. INS*, 257 F.3d 1038 (9th Cir. 2001)

- ✓ ***Affirmed***

- ✓ *Chebchoub v. INS*, 257 F.3d 1038 (9th Cir. 2001) (b) (6); upholding adverse credibility determination and denying asylum; petition denied; Alien asserted he had been beaten and arrested because of his involvement in political advocacy; WALLACE; distinguished by *Shire v. Ashcroft*, 388 F.3d 1288 (9th Cir. 2004).

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, Morocco (2001). Alien's inconsistent testimony regarding events causing his departure from Morocco and number of times he was arrested for political activities, along with implausibility of his testimony regarding Morocco's exile practices, related to basis for his fear of persecution and went to heart of asylum claim, and he inexplicably failed to submit corroborative evidence that should have been readily available.

Credibility/State Department Reports, Reliance On Permitted, Morocco (2001). "[T]he use of a country report to discredit a general assertion made by an applicant regarding the context in which his alleged persecution took place does not offend the individualized analysis of an applicant's credibility that our case law mandates." (at 1044). General assertions made by the applicant that are inconsistent with state department reports can be discredited by comparison thereto, so long as such is 'supplemental' to other credibility concerns." (at 1044).

Credibility/Corroboration Required. Alien's failure to submit corroborative affidavits from his brother in France and other members of political group with which alien was allegedly associated supported adverse credibility determination; securing affidavit from close relative living in Western Europe and from person in United States to support alien's political involvement in group that alien claimed was commonly expelled from Morocco should have been relatively uncomplicated task that would not pose type of evidentiary burden that would excuse corroboration. "If the trier of fact does not believe the applicant or does not know what to believe, the applicant's failure to corroborate his testimony can be fatal to his asylum application. Thus the regulations unambiguously contemplate cases where an applicant's testimony alone will not satisfy his burden of proof." (at 1042).

- ✗ ***Not Affirmed***

Nepal

Chronology

- ✖ *Bhattarai v. Lynch*, 835 F.3d 1037, (9th Cir. 2016)
- ✖ *Khadka v. Holder*, 618 F.3d 996 (9th Cir. 2010)
- ✓ *Tamang v. Holder*, 598 F.3d 1083 (9th Cir. 2010)
- ✓ *Shrestha v. Holder*, 590 F.3d 1034 (9th Cir. 2010)
- ✓ *Dhital v. Mukasey*, 532 F.3d 1044 (9th Cir. 2008)

✓ *Affirmed*

- ✓ *Tamang v. Holder*, 598 F.3d 1083 (9th Cir. 2010) (b) (6); affirming a denial of relief by applying the REAL ID Act. The respondent did not assert a claim of “personal persecution.” Rather, Maoists had broken his brother’s leg and generally threatened the family. The brother had been granted asylum. Respondent sought to justify his untimely asylum application by asserting ineffective assistance of counsel. BENITEZ.

Bars to Asylum/One Year Bar, Ineffective Assistance (2010). Respondent could not identify the attorney who he claimed had provided ineffective assistance nor could he provide any other specific details. The court emphasized the need for compliance with the *Lozada* requirements as the case reflected the very “circumstances for which [they] were intended.” “The goal of *Lozada* was to provide a more effective basis from which to assess the veracity of the substantial number of ineffective assistance claims asserted by asylum applicants and to hold attorneys to appropriate standards of performance.” The court explained that to qualify for the exception under 8 C.F.R. § 1208.4(a)(5)(iii)(A) - (C), the alien must (1) provide an affidavit which details the relationship with counsel to include the relied upon representations; (2) inform the counsel being complained of the allegations made and give him the opportunity to respond; and (3) file an appropriate complaint against the lawyer. The court rejected Respondent’s efforts to avoid these requirements in his argument that the ineffective assistance was “plain on its face.” The court restated the principle from *Albillo-DeLeon v. Gonzales*, 410 F.3d 1090, 1099 (9th Ci. 2005) that “ineffective assistance” cannot be based on the performance of a “mere consultant or friend whose opinion” might have been relied upon to the applicant’s detriment.

Persecution/Of Family, Affirmed, Nepal (2010). The fact that threats were made against the family and indeed that the brother had been granted asylum was not sufficient to justify the grant of asylum to respondent. The court cited to the lack of “personal persecution” of respondent, the fact that family members had returned to Nepal without incident, respondent himself had been in the U.S. when the attack on his brother and threats had occurred, and there had been improved country conditions. The court cited five cases for the proposition that “it is well established . . . an alien’s history of willingly returning to his or her home country militates against a finding of past persecution or a well-founded fear of future persecution.” The fact that

the brother had been granted asylum was not found to require that respondent receive asylum, in addition to the fact that the filing was untimely.

Credibility - Post-REAL ID/Selective Examination of Evidence. The respondent had claimed that “nothing had changed” with regard to political developments in Nepal. The court upheld the adverse credibility finding regarding that assessment under *Shrestha v. Holder*, 590 F.3d 1034, 1039-48 (9th Cir. 2010). The court noted, however, that “an IJ cannot selectively examine evidence in determining credibility, but rather must present a reasoned analysis of the evidence as a whole and cite specific instances in the record.”

- ✓ *Shrestha v. Holder*, 590 F.3d 1034 (9th Cir. 2010) (b) (6)); affirming a denial of relief applying the REAL ID Act. The decision has a lengthy discussion about credibility and corroboration standards. Respondent claimed that Maoists had attempted to recruit him and that he was brutally beaten when he resisted. The IJ found that the Respondent was not credible. GOULD.

Credibility - Post-REAL ID/REAL ID Standard; Unresponsiveness; Lack of Detail. To support an adverse credibility determination, the IJ must “provide specific and cogent reasons.” The IJ further should evaluate “the petitioner’s explanation for a perceived inconsistency.” One of the recognized bases for finding a lack of credibility is “unresponsiveness.” “The agency is not required to provide a pinpoint citation to the record, but rather to “identify particular instances in the record where the petitioner was unresponsive.” In the case at bar, the standard was met when the IJ found that the respondent “was unresponsive to questions concerning ‘whether anyone may have been looking for him,’” which established “specificity in pointing to instances of unresponsiveness.” Another recognized basis for finding a lack of credibility is “lack of detail.” The Respondent “did not identify the names of any of the Maoists or describe them in any way. Nor did he state how many were inquiring about him, why they were looking for him, what they wanted, why he thought their interest in him persisted given that they had not inquired about him since 2001, or why he continued to fear the Maoists in light of their apparent loss of interest in him.” Another recognized basis for finding a lack of credibility is inconsistency. The IJ had found inconsistency between the testimony that the Maoists had inquired about him on two specific occasions in 1998 and 2001 and a more general assertion that there had been inquiries “frequently.” The court found that no explanation had been provided for this inconsistency and considered it an “important factor” as it related to “the underlying events that give rise to his fear.”

Credibility - Post-REAL ID/Corroboration, Reasonable to Expect. The court cited to *Aden v. Holder*, 589 F.3d 1040 (9th Cir. 2009) for the premise that even a credible petitioner may be required to provide “reasonably obtainable” supportive evidence. In this case, the respondent’s parents could have directly supported his claim but did not. The fact that they were illiterate and “in fear of the Maoists” did not excuse this obligation.

CAT/Standard Where No Credibility. “When the petitioner’s testimony is found not credible, to reverse the BIA’s decision denying CAT protection we would have to find that the reports alone compelled the conclusion that the petitioner is more likely than not to be tortured. *Almaghar v. Gonzales*, 457 F.3d 915, 922-23 (9th Cir. 2006). As of May 2006, there was a peace

accord in place between the Maoists and the Nepalese Government” and the Respondent had not otherwise made the required showing.

- ✓ *Dhital v. Mukasey*, 532 F.3d 1044 (9th Cir. 2008) (b) (6)); affirming a denial of relief. The respondent “confessed that he previously had been granted asylum under a false identity.” (at 1047). He asserted that “he was a popular political activist in Nepal who opposed the Maoists.” *Id.* He was “encouraged to join” and “threatened” as well as “attacked” when he refused. *Id.* Thereafter, he came to the U.S. where he continued to engage in public advocacy against the Maoists. Family members who remained in Nepal were then threatened and Maoists “seized his parent’s land.” *Id.* The respondent was granted asylum. He then failed to attend college classes for which he received permission under the false identity but for other purposes, continued to use his correct name. He was again placed in proceedings. His second application for asylum was denied by the same IJ who previously granted his earlier case. The Board found that his first application had been frivolous and that it was time barred. PER CURIAM.

Asylum Application/Frivolous, Found, Nepal (2008). The court found that this finding was not consistent with the Board’s holding in *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007). It chose not to remand “because the BIA articulated an alternative ground for its decision.” (at 1048).

Bars to Asylum/One Year Bar, Found, Nepal (2008). The court upheld the finding of an untimely application. “Dhital did not file his second asylum application until 22 months after he failed to enroll in school...” The argument that it was reasonable to have filed such “76 days after being served with his Notice To Appear” was rejected. (at 1050).

Credibility - Pre-REAL ID/Propensity for Dishonesty, Affirmed. The adverse credibility determination was upheld in that he had a “propensity for dishonesty,” citing *Don v. Gonzales*, 476 F.3d 738 (9th Cir. 2007), on the basis of his concession of having previously lied. *Id.*

CAT/Individualized Threat. This claim was rejected on the basis that the evidence did not show that “Dhital would face any particular threat of torture beyond that of which all citizens of Nepal are at risk.” (at 1051).

✕ *Not Affirmed*

- ✕ *Bhattarai v. Lynch*, 835 F.3d 1037, (9th Cir. 2016) (b) (6)); remanding for further evidence after the Circuit found the IJ and BIA’s adverse credibility determination was not supported by substantial evidence. *Id.* at *7. The IJ found the alien not credible, and the BIA found no clear error in this finding, and refused to remand for consideration of the additional evidence the alien presented before it. *Id.* at *2. The Circuit analyzed each of the purported inconsistencies and found that they were either not properly addressed by the IJ at the hearing, or more properly categorized as lack of corroboration. *Id.* at *4. However, the alien was not given the chance to explain the inconsistencies identified by the IJ. *Id.* at *6. Consequently, “he did not know until after the hearing that certain evidence was required, but once he knew he could not submit it because, in the view of the BIA, the

evidence had been available at the time of the hearing.” *Id.* at *7. The Circuit thus found that the alien had not been given “notice and a fair opportunity to provide the necessary corroborative evidence or explain why it [was] not reasonably available,” pursuant to the REAL ID Act, and remanded for the BIA to provide that opportunity. *Id.* FLETCHER.

Credibility - Post-REAL ID/Opportunity to Explain, Nepal (2016). The Circuit noted that the various factors that can form the basis of an adverse credibility finding, and that some IJs “rely on lack of corroboration as a reason for finding an applicant’s testimony not credible, but this does not eviscerate *Ren*’s notice-and-opportunity requirement.” *Id.* at *4. Rather, as stated in *Lai*, the denial of relief cannot stand if, on review, the factors besides lack of corroboration for the adverse credibility determination are rejected, and the *Ren* requirements for corroborative evidence were not satisfied. *Id.* at *4 (citing *Lai v. Holder*, 773 F.3d 966, 976 (9th Cir. 2014)).

The Circuit described the process it takes in reviewing an adverse credibility determination “in which lack of corroboration is one of several stated grounds First, we separate out the non-corroboration grounds . . . and evaluate whether the IJ’s and BIA’s determination is supported by substantial evidence.” *Id.* at *4. If it is, the adverse credibility determination stands. *Id.* If it is not, “and only issues regarding lack of corroboration remain, we next ask whether the IJ satisfied *Ren*’s notice requirement” to give the alien of which corroborative evidence should have been submitted and an opportunity to provide this evidence or explain why he or she cannot reasonably obtain it. *Id.* at *3-4. If the IJ has not satisfied the requirement imposed by *Ren*, then the Ninth Circuit will “remand for the IJ to give the applicant [the] opportunity” to provide corroborative evidence or explain why he or she cannot reasonably obtain it. *Id.* at *4.

- * ***Khadka v. Holder*, 618 F.3d 996 (9th Cir. 2010)** (b) (6); reversing a finding of a frivolous filing of an I-589. The issue involved a fabricated news article which asserted that Respondent had been mistreated by Maoists or Communists. DHS presented the testimony of the Chief of the Consular Section at the US embassy who had conducted the investigation. He “testified about an elaborate scheme involving the publisher of a newspaper associated with Khadka’s brother in law’s political party to print a non-circulating issue and plant a copy at the National Press Archives.” The circuit upheld the adverse credibility finding but did not find the facts sufficient to justify a frivolous finding, stating “Brault’s testimony combined with Khadka’s failure to disclaim the article or provide any explanation for how it came into his possession without him knowing that it was never circulated, supports the conclusion that Khadka was aware of the circumstances of the publication.” THOMAS. Partial dissent by HALL, who felt that the frivolous finding should be upheld.

Credibility - Pre-REAL ID/Adverse Finding Upheld. In upholding the adverse credibility determination, the circuit found the record to be sufficient. The circuit cited *Yeimane-Berhe v. Ashcroft*, 393 F.3d 907, 911 (9th Cir. 2004) (holding that an adverse credibility finding based only on the submission of a counterfeit medical document was not supported by the record where there was “no evidence indicating that she knew the document was fraudulent”); *Corovic v. Mukasey*, 519 F.3d 90, 97-98 (2nd Cir. 2008) (where applicant disputes knowledge of the fraud, IJ must evaluate whether applicant had reason to know that the documents submitted were

fraudulent). The circuit upheld the finding even though the IJ “did not make a specific finding that Khadka knew about the circumstances of the article’s publication.”

Asylum Application/Frivolous, Not Found, Nepal (2010). In reversing the frivolous finding, the court emphasized that “a finding of frivolousness does not flow automatically from an adverse credibility finding.” Furthermore, “fabrication of material evidence does not constitute fabrication of a material element” because there was other evidence in the record “that supports the plausibility of Khadka’s claim [of mistreatment] . . . They undermine the IJ’s frivolous finding, which must be based on evidence indicating that a material element of the claim was actually false. The IJ also erred by not informing Khadka that he was considering making a frivolous finding or otherwise giving Khadka sufficient opportunity to account for any of the alleged discrepancies and implausibilities in the record....”

Netherlands

Chronology

- ✓ *Rahimzadeh v. Holder*, 613 F.3d 916 (9th Cir. 2010)

- ✓ ***Affirmed***

- ✓ *Rahimzadeh v. Holder*, 613 F.3d 916 (9th Cir. 2010) (b) (6); affirming a denial of relief. The respondent is a citizen of Iran. He had been persecuted there and was granted asylum in the Netherlands in 1996. Credibility was not at issue. He claimed that in 1999, he had been threatened at knife point and beaten “all while complaining of his conversion to Christianity.” He reports an additional series of problems in the Netherlands in 2005, including receiving threatening phone calls and being forced into a car by four people carrying guns, who threatened him and his family “if he continued to attend his church” or if he reported such actions to the police. Respondent did not report any of these incidents to the police. He “presented evidence that he suffers from PTSD” as well as documentary evidence detailing Islamic radicalism in the Netherlands and death threats to Muslims who convert to Christianity. The State Department country report asserts that “the Dutch government at all levels . . . did not tolerate abuse of the right to freedom of religion either by government or private actors . . . that the Netherlands has taken firm action against groups espousing violence in support of the Islamic extremist agenda [and] that the law and judiciary provide effective relief for abuses of human rights.” BERZON. Judge Berzon also authored another published decision on the same date reaching a different result on the issues of “ability to control” and the expectation that asylum applicants would seek police assistance. See *Afriye v. Holder*, 613 F.3d 924 (9th Cir. 2010).

Unable or Unwilling to Control/Reporting Not Required, Affirmed, Netherlands (2010). Unlike the result in *Afriye*, the circuit found that respondent had not shown that it would have been “futile” to seek the assistance of the police. The circuit cited to the Department of State country report as providing an appropriate basis for this assessment.

Unable or Unwilling to Control/Fear of Retaliation for Reporting. The fact that respondent “received private threats of retaliation” does not justify the claim, as it is expected that there would be “at least an implicit threat of retaliation for recourse to the authorities. While private threats may explain an applicant’s reluctance to go to the authorities, the question in an asylum case is whether the police could and would provide protection.”

Credibility/State Department Reports, Reliance on Permitted, Netherlands (2010). Respondent argues that since there was no adverse credibility determination, it was error to rely on the State Department material rather than accepting respondent’s justification. The circuit found that respondent’s opinion as to why he did not seek police assistance had been properly rebutted, as “the IJ turned to the country reports only to assess the likelihood that

government officials would control the persecution. . . the IJ did not use the country reports to counteract specific credible evidence of incidents inconsistent with the country reports.”

✕ *Not Affirmed*

Nicaragua

Chronology

- ✖ *Blandino v. Holder*, 712 F.3d 1338 (9th Cir. 2013)
- ✓ *Robleto-Pastora v. Holder*, 591 F.3d 1051 (9th Cir. 2010)
- ✖ *Vallecillo-Castillo v. INS*, 121 F.3d 1237 (9th Cir. 1997)
- ✓ *Mejia-Paiz v. INS*, 111 F.3d 720 (9th Cir. 1997)
- ✓ *Gutierrez-Centeno v. INS*, 99 F.3d 1529 (9th Cir. 1996)
- ✖ *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996)
- ✖ *Osorio v. INS*, 99 F.3d 928 (9th Cir. 1996)
- ✖ *Rodriguez-Matamoros v. INS*, 86 F.3d 158 (9th Cir. 1996)
- ✖ *Gonzalez v. INS*, 82 F.3d 903 (9th Cir. 1996)

✓ *Affirmed*

- ✓ *Robleto-Pastora v. Holder*, 591 F.3d 1051 (9th Cir. 2010) (b) (6); affirming a denial of relief regarding the current asylum request as well as a request to “readjust” based on a former grant of asylum. Credibility was not at issue. Respondent and his family had left the country at a time when the government was controlled by Sandinistas. He became an LPR and was later convicted of an aggravated felony for forgery. He again applied for asylum and sought termination of the proceedings. The current claim was based on the fact that he had lost his government employment because he was perceived as a supporter of the former government and he was unable to find other employment. Two brothers experienced periods of detention and mistreatment in 1981-82. The family is related to “a famous anti-Sandinista leader.” Notwithstanding the 2006 reelection of Sandinista leader and a stated fear of return, the respondent “failed to produce evidence that the currently democratically elected administration was persecuting former Somoza-government employees or members of Robleto’s family.” CALLAHAN.

Asylum Application/Prior Grant of Asylum; Well-Founded Fear/No Presumption from Previous Asylum Grant. The Court rejected the claim that respondent is eligible for asylum and withholding “based on the previous grant of asylum which he asserts entitles him to a presumption of a well-founded fear of persecution.” The court was unwilling to find past persecution notwithstanding the experiences of the brothers.

Adjustment of Status/Readjustment of Asylee. The Court did not permit the respondent to “readjust” his status to that of an LPR. Respondent had argued that because his asylee status had never been formally terminated, he could “readjust” under INA § 209(b) and (c). The Court cited to *Saintha v. Mukasey*, 516 F.3d 243 (4th Cir. 2008) and *Gutnik v. Gonzales*, 469 F.3d 683 (7th Cir. 2006) in finding that an alien who adjusted from refugee status to LPR status under section 209(a) was ineligible to readjust under sections 209(b) and (c).

Due Process/Access to Complete File. The Court found no due process violation even though “his request for a continuance to obtain his immigration records” was denied. There had not been any “prejudice” because he was “able to present his full claims for relief without it.”

- ✓ *Mejia-Paiz v. INS*, 111 F.3d 720 (9th Cir. 1997) (b) (6); upholding denial of asylum and withholding based on applicant’s failure to present candid, credible and sincere testimony demonstrating genuine fear; SNEED; (FERGUSON, dissenting, argued that the government violated the First Amendment by deciding the religious question of who is a Jehovah’s Witness).

Well-Founded Fear/Subjectively Genuine. Asylum applicant from Nicaragua claiming religious persecution as Jehovah’s Witness failed to satisfy subjective component of well-founded fear standard by failing to present candid, credible and sincere testimony demonstrating genuine fear of persecution; he could have offered proof that he was member of Jehovah’s Witness but did not, his testimony was inconsistent as to when he was fired from his job and whether he joined Sandinista-supported employees’ union, and he could not recall year in which he became Jehovah’s Witness.

Well-Founded Fear/Objectively Reasonable, Not Found, Nicaragua (1997). “Proving one’s membership in a church does not pose the type of particularized evidentiary burden that would excuse corroboration.” (at 723–24).

Administrative Proceedings/Judicial Notice. IJ took judicial notice that Jehovah’s Witnesses were prohibited from swearing under oath and could only *affirm*, and noted that applicant swore under oath on two occasions. “We recognize that even a Jehovah’s Witness might have sworn under oath in the circumstances in which the petitioner found himself. Although we would consider this inconsistency, amongst a body of credible and persuasive evidence to the contrary, an inadequate basis for an adverse credibility finding, ... we find no fault in the IJ’s mention of it. It is but one of numerous telling details in this case.” (at 724).

- ✓ *Gutierrez-Centeno v. INS*, 99 F.3d 1529 (9th Cir. 1996) (b) (6); upholding denial of asylum and withholding; remanding based on BIA’s abuse of discretion in denying suspension of deportation; REINHARDT; *suspension portion of decision superseded by statute as stated in Falcon Cariche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003).

Well-Founded Fear/Objectively Reasonable, Not Found, Nicaragua (1996). Evidence of arrest of petitioner’s uncle, reduction of her food ration card, and government file characterizing her as untrustworthy was not so compelling that reasonable fact finder would have to conclude that she established well-founded fear of persecution.

✕ *Not Affirmed*

- ✕ *Blandino-Medina v. Holder*, 712 F.3d 1338 (9th Cir. 2013) (b) (6); remanding a denial of withholding of removal. Respondent was convicted of committing lewd and lascivious acts with a child under the age of 14 and sentenced to one year in prison, plus

probation. After this conviction, he was placed in proceedings. Respondent reported various problems that he and his family had with the Sandinista Liberation Front. The Board found this conviction to have been a per se particularly serious crime (PSC). The Circuit upheld the denial of his asylum and CAT claims. BEA

Bars to Withholding/Particularly Serious Crime, Not Found (2013). “All aggravated felonies are categorically particularly serious crimes for the purposes of asylum, but only aggravated felonies for which the alien was sentenced to at least five years’ imprisonment are categorically particularly serious for the purposes of withholding of removal.” 712 F.3d at 1346. To apply the bar, the IJ should examine “the individualized characteristics of the offense, including the fact that the offense was a crime against a person, that the respondent was required to register as a sex offender, and the statement in support of the warrantless arrest describing the nature of the respondent’s crime.” *Id.* at 1148 (citing *Matter of N-A-M-*, 24 I&N Dec. 336, 343 (BIA 2007)).

CAT/More Likely Than Not, Not Found, Nicaragua (2013). The IJ initially granted withholding of removal under CAT upon finding that Respondent had suffered past persecution. Following the Government’s appeal, that finding was reversed. The Circuit accepted that Respondent had not demonstrated “that it was ‘more likely than not’ that Blandino would be tortured . . . rather than presenting hard evidence of a probability that he would be tortured, Blandino merely presented a series of worst-case scenarios. . . . he had not presented evidence that similarly-situated individuals are being tortured by Nicaraguan officials.” *Id.*

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- ✱ *Vallecillo-Castillo v. INS*, 121 F.3d 1237 (9th Cir. 1997) (b) (6)); granting withholding and remanding for discretionary grant of asylum; PREGERSON; (TROT, dissenting, argued the majority misapplied the substantial evidence test and should have remanded for the BIA to decide whether the presumption has been overcome).

Persecution/Of Family, Not Affirmed, Nicaragua (1997); Threats, Not Affirmed, Nicaragua (1997); Property Damage, Nicaragua (1997). Alien suffered past persecution, where his uncle and brother were imprisoned for their participation in and support of the Somoza government, alien was branded a traitor for his refusal to teach Sandinista doctrine and was harassed for not attending CDS meetings, and threats led to alien’s home being set on fire, pelted with rocks, and vandalized with slogans decrying his family as traitors painted on the house.

Past Persecution/Changed Conditions, Administrative Notice. Administrative notice of changed country conditions alone does not overcome the presumption of a reasonable fear of future persecution when the alien has presented specific evidence.

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- ✱ *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996) (b) (6)); reversing denial of asylum and withholding based on BIA’s failure to consider whether past persecution was atrocious; reversed and remanded; Alien’s actions in remaining in Nicaragua for eight years, working, marrying and having children after she was raped and abused while imprisoned on account of her political opinion were not relevant to atrocity of her past persecution; persecution had already taken place, and remaining did not lessen its severity; HAWKINS; distinguished by *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001).

Persecution/Rape; Detention, Not Affirmed, Nicaragua (1996); Forced Labor; Food Deprivation. Alien suffered past persecution on account of her political opinion, where she was imprisoned because her neighbor accused her of being contra supporter and Sandinista military officials knew of her father's ties to previous regime, and, while she was in captivity, her captors raped her, physically abused her, deprived her of food, and subjected her to forced labor.

- ✱ *Osorio v. INS*, 99 F.3d 928 (9th Cir. 1996) (b) (6)); reversing adverse credibility determination and remanding; REINHARDT.

Credibility - Pre-REAL ID/Articulable Basis, Not Affirmed, Nicaragua (1996). "If, on remand, the Board or the IJ seeks to conclude once again that Osorio is not a credible witness, it must identify the specific inconsistencies on which it rests its adverse credibility determination, and it must address in a reasoned manner the explanations that Osorio offers for these perceived inconsistencies." (at 933).

Past Persecution/Individualized Analysis, Nicaragua (1996). "In addition, if the Board or the IJ determines that Osorio has experienced past persecution, it must afford him the benefit of the presumption that he has a well-founded fear of future persecution. This presumption can be overcome only by an individualized analysis of Osorio's situation that demonstrates that changed conditions in Nicaragua have eliminated the basis for Osorio's individual fear of future persecution." (at 933).

- ✱ *Rodriguez-Matamoros v. INS*, 86 F.3d 158 (9th Cir. 1996) (b) (6)); reversing and finding past persecution sufficient for a grant of asylum; BIA abused its discretion by failing to provide sufficient explanation of its decision to deny asylum; RYMER.

Persecution/Physical Harm, Not Affirmed, Nicaragua (1996); Property Damage, Nicaragua (1996); Of Family, Not Affirmed, Nicaragua (1996). Alien credibly testified she was severely beaten, her home was vandalized, she and her family were threatened with being burned alive, and her sister was tortured and then killed in her presence all on account of her political beliefs and those of her family.

- ✱ *Gonzalez v. INS*, 82 F.3d 903 (9th Cir. 1996) (b) (6)); upholding denial of religious-based asylum claim; reversing denial of asylum based on political opinion; petition denied in part, remanded in part; KLEINFELD *distinguished by* *Theogene v. Gonzales*, 411 F.3d 1107 (9th Cir. 2005).

Nexus/Motive Not Found, Pre REAL ID, Nicaragua (1996). Alien's fear of future persecution on account of her religion (Jehovah's Witness) was not well-founded; primary harm she had suffered was being forced into national service during Sandinista regime where she would have to wear uniform and carry gun, which was contrary to her conscience, but imposed on all young people, she did not try to ascertain whether she could perform national service without meeting those requirements, and she did not feel compelled to leave Nicaragua until after her mother's house was taken away by government, long after impositions on her church.

Nexus/Motive Found, Pre REAL ID, Nicaragua (1996); Well-Founded Fear/Objectively Reasonable, Found, Nicaragua (1996). Alien's fear of persecution on account of her political opinion as Somoza supporter was well-founded; she was personally threatened based on her political opinion with being "disappeared," threats were repeated, they were backed by official position of Sandinista neighborhood committee and visits from armed soldiers, her family suffered from considerable violence on political grounds, she was afraid to go back to Nicaragua to pick up immigrant visa at American Consulate, her ration card and her business's ability to buy inventory were taken away on account of her political opinion, and her family land was taken away for political reasons.

Administrative Proceedings/Judicial Notice. "Taking notice of legislative, undebatable facts, such as an election result and new parliamentary majority, does not require notice and an opportunity to be heard, but taking administrative notice of post-hearing debatable adjudicative facts without warning and an opportunity to offer rebuttal denies due process of law." (at 912).

Nigeria

Chronology

- ✖ *Oshodi v. Holder*, 729 F.3d 883 (9th Cir. 2013) (en banc)
- ✖ *Oyeniran v. Holder*, 672 F.3d 800 (9th Cir. 2012)
- ✖ *Edu v. Holder*, 624 F.3d 1137 (9th Cir. 2010)
- ✖ *Eneh v. Holder*, 601 F.3d 943 (9th Cir. 2010)
- ✖ *Tijani v. Holder*, 628 F.3d 1071 (9th Cir. 2010)
- ✓ *Unuakhaulu v. Ashcroft*, 398 F.3d 1085 (9th Cir. 2005)
- ✖ *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004)
- ✖ *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000)
- ✖ *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999)

✓ *Affirmed*

- ✓ *Unuakhaulu v. Ashcroft*, 398 F.3d 1085 (9th Cir. 2005) (*amending and superseding* 392 F.3d 1024) ((b) (6)); upholding IJ's adverse credibility determination; alien failed to demonstrate he would suffer persecution based on his membership in tribe; petition denied; Alien had been convicted of conspiracy to traffic in counterfeit credit cards; he was denied withholding of removal and CAT relief. He testified that "the Nigerian government engaged in tribal genocide of the Ogoni people, seizing their land in the delta region for its oil, and arresting and executing Ogonis solely because of their opposition to the government." His father's land had been seized, "his seven siblings left Nigeria because of the treatment of the Ogoni." (at 1087-88). Respondent claimed that his uncle was a very prominent political activist who had been mentioned in an Amnesty International report of record, and further asserted that the uncle had been in jail for many years and was "still in prison" because of his political activism. (at 1088). The court accepted the proposition that "corroborating proof was 'more than necessary here because the respondent's conviction is for a crime involving fraud which already undermines his credibility.'" (at 1092). FISHER.

Withholding of Removal/Denied, Nigeria (2005). Alien's concession that the Nigerian government could not identify him as Ogoni, coupled with his admission that he was not persecuted in the past, demonstrate that he has not met his burden of proving that it is more likely than not that he would be subject to persecution on account of his tribal affiliation. (at 1091).

Country Reports/Use For Credibility. "Country conditions evidence generally provides the context for evaluating an applicant's credibility, rather than corroborating specifics of a claim. See *Duarte de Guinac v. INS*, 179 F.3d 1156, 1162 (9th Cir. 1999)." (at 1091).

Credibility - Pre-REAL ID/Detail, Lack Of (2005); Corroboration Required. "[The IJ] found that parts of [alien's] testimony were meager and nonspecific and that the absence of

corroborative evidence where one would reasonably expect there to be, along with an adequate explanation of why such evidence was not obtained nor presented leaves the court to draw an adverse inference regarding the credibility of the respondent's claim. [The IJ] also found that corroborating proof was more than necessary here because the respondent's conviction is for a crime involving fraud which already undermines his credibility." (at 1091-92 (internal quotations omitted)).

Changed Country Conditions/Internal Relocation Possible, Nigeria (2005); Changed Conditions Found, Nigeria (2005). "The IJ found that [alien]'s testimony 'basically paralleled' information contained in the Country Report—that Ogonis who live in their homeland, the delta region of Nigeria, who are political activists are identifiable as Ogonis and thus may be subjected to persecution by the Nigerian government. This, however, did not establish that [alien] is a member of the Ogoni tribe or that it is more likely than not that he would be subjected to persecution if he were deported to another region of Nigeria outside of the delta region." (at 1092).

✕ *Not Affirmed*

- ✕ ***Oshodi v. Holder*, 729 F.3d 883 (9th Cir. 2013) (en banc);** The Circuit held that the IJ had denied Respondent due process by finding him incredible when he had not been permitted to testify regarding the events central to his claim of persecution and the IJ instead relied on the documentary record. The disposition mooted the issue of corroboration under the REAL ID Act, which had been a major part of the now vacated panel decision. PAEZ. Dissent by KOZINSKI.

Due Process/Right to Testify. The IJ recognized that if Respondent had been deemed credible, he would have demonstrated past persecution. Still, it was acknowledged that "nothing in our decision curtails the IJ's ordinary discretion to limit testimony in order to 'focus the proceedings and exclude irrelevant evidence.' The IJ simply cannot do so in a wholesale manner that precludes the applicant from fully and fairly testifying as to the contents of his application." 729 F.3d 891 n.9 (quoting *Cham v. Attorney General*, 445 F.3d 683, 694 (3d Cir. 2006)). The decision does not speak to the considerable Ninth Circuit case law which allows an alien to be found to merit a grant of relief solely on the basis of a documentary record. *See, e.g., Ochoa v. INS*, 254 F.3d 859, 865 (9th Cir. 2001) ("The IJ must consider evidence contained in [the] application for asylum. Testimony is not required; an applicant may rest on her application, if she swears at the hearing that the contents of the application are true."); *Zahedi v. INS*, 222 F.3d 1157, 1166 (9th Cir. 2000) ("The objective component of the asylum claim is complete even without Zahedi's testimony."); *Grava v. INS*, 205 F.3d 1177, 1180 (9th Cir. 2000) ("the asylum application sometimes represents an alien's best case" for establishing relief and rejecting the BIA's assessment, "that it could not consider his written application as evidence absent a stipulation that the oral testimony would be consistent with the written assertions."). The asylum seeker does not have to testify in order to be granted relief, as the BIA's finding that Respondent had given up his right to seek asylum by failing to testify was reversed. Hence, one can only conclude that the Circuit's view of due process in the asylum context requires full consideration of either documentary submissions or unfettered testimony.

- ✱ *Edu v. Holder*, 624 F.3d 1137 (9th Cir. 2010) (b) (6)); reversing the BIA's reversal of an IJ's grant of deferral of removal under CAT. Respondent had been involved in political advocacy in Nigeria and the IJ found that she had been subjected to torture as a result. She had also been subjected to FGM. The IJ found her credible. Because she had been convicted of an aggravated felony that was a particularly serious crime, she was only eligible for CAT relief. The IJ granted relief under CAT. The BIA reversed on the premise that Respondent could "avoid torture by ceasing to exercise her political rights." 624 F.3d at 1139. The BIA concluded that "CAT was not intended to protect voluntary behavior and political activism." *Id.* at 1141. It also stated that she could have "reduce[d] her risk of torture by relocating to another part of the country." *Id.* FERNANDEZ.

CAT/Political Activity. The circuit relied on its asylum case law for rejecting the BIA's conclusion, stating that the CAT is "not designed to protect individuals from having to return to a place where they are unable to exercise their political rights." *Id.* at 1143. Citing *Zhang v. Ashcroft*, 388 F.3d 713, 719 (9th Cir. 2004), the circuit stated that it had "rejected that kind of thinking in the asylum area, and have declared that it is 'contrary to our basic principles.'" *Id.* at 1146.

CAT/Deferral of Removal, Not Affirmed, Nigeria (2010). The circuit reiterated that CAT relief is mandatory, explaining that "CAT does not permit any discretion or provide for any exceptions." *Id.* at 1145. Moreover, "even if a person was deserving of punishment in that country, torture would not be justified." *Id.*

CAT/Internal Relocation, Not Affirmed, Nigeria (2010). The circuit dismissed the BIA's assertion that Respondent could have relocated by citing to its asylum case law. It stated that "we have indicated that when a nation's government is itself persecuting its citizens, it has never been thought that there are safe places within that nation." (at 1146). The circuit cited to *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995); *Fakhry v. Mukasey*, 524 F.3d 1057 (9th Cir. 2008); *Melkonian v. Ashcroft*, 320 F.3d 1061 (9th Cir. 2003); and others.

- ✱ *Eneh v. Holder*, 601 F.3d 943 (9th Cir. 2010) (b) (6)); reversing and remanding the denial of a CAT claim. Respondent had been found ineligible for both asylum and withholding of removal as a result of a criminal conviction related to the sale of marijuana. The circuit's decision only dealt with the denial of CAT relief. Credibility was not at issue. Respondent had AIDS and required numerous medications. He asserted that upon return to Nigeria, he would be taken to jail and would not be given the medications he required. The IJ denied the claim, finding that the harm that he would likely experience would "not be done at the instigation of a public official . . . and does not meet the requirement that the act be intentionally inflicted." The circuit noted that "Nigeria has an official policy of imprisoning its citizens for drug-related crimes committed abroad." HALL.

CAT/Acquiescence, Not Affirmed, Nigeria (2010). "In *Villelgas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008) we clarified that a petitioner must show for purposes of CAT relief that someone – either a government official or private actor – specifically intended to torture him or her. It is only when the alleged torture would be at the hand of a private entity is mere awareness or

willful blindness by the government sufficient. In *Villegas*, a petitioner with bipolar disorder claimed that if he were removed to Mexico, he would be placed in a mental institution, and he presented evidence that Mexican mental patients are housed in deplorable conditions akin to torture. The panel rejected his CAT claim because ‘nothing indicates that Mexican officials (or private actors to whom officials have acquiesced) created those conditions for the specific purpose of inflicting suffering upon the patients.’ Unlike in *Villegas*, however, the thrust of Eneh’s argument is not just that the conditions in Nigerian prisons are tortuous generally, but that Nigerian officials would single him out for mistreatment.”

- ✱ *Tijani v. Holder*, 628 F.3d 1071 (9th Cir. 2010) (amended decision entered and denial of pet. for rehearing) (b) (6); remanding a denial of relief based on a failure to corroborate where there had not been an explicit adverse credibility determination. This was not REAL ID Act case, and the court noted the result would have been different thereunder. The decision primarily discussed whether Respondent was removable as an alien convicted of two crimes involving moral turpitude, with less discussion devoted to the asylum claim. Respondent had been convicted of providing false information to obtain credit cards to obtain goods on separate occasions, among other offenses. The dissent notes “Tijani has been found by judges to have lied on 16 prior occasions.” The asylum claim was based on his converting from Islam to Christianity and that on a return visit to Nigeria he had been violently assaulted for such. NOONAN; partial concurrences and dissents by TASHIMA and CALLAHAN.

Credibility - Pre-REAL ID/Corroboration Not Required, Nigeria (2010). The IJ ruled that considering the multiple lies with respect to his convictions as well as the conflict between his story of change in religion and the account given in a supporting letter, the IJ had “reason not to believe him.” The IJ explicitly refused to rule that the respondent was not credible, reasoning that he could not find an inconsistency in testimony. Notwithstanding there being “reasons set out strongly” for doubting the respondent’s credibility, the circuit rejected the administrative requirement of corroboration because the adverse credibility determination was not “explicit” and therefore could not support a requirement for “corroboration evidence.”

CIMT/Fraud. The majority held that the “full range of conduct” involved in the statutory violation “involves fraud” even though there was no specific requirement of an “intent to defraud.” In other words, the “intent to defraud” was found to be “implicit” in the nature of the crime.

- ✱ *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (b) (6); remanding CAT claim; upholding denial of asylum based on insufficient motion to reopen; WALLACE.

Ineffective Assistance/Not Plain on Face. Where Nigerian national, in filing out-of-time motion to reopen deportation proceedings based on her attorney’s alleged ineffective assistance in not presenting, as ground for asylum, the fact that she had been subjected to FGM in Nigeria, did not include affidavit setting forth in detail her agreement with attorney as to what actions were to be taken on appeal, BIA did not abuse its discretion in denying her untimely motion to

reopen; counsel's ineffectiveness was not plain on the face of the administrative record, given that alien, by her own admission, had never informed attorney of her FGM.

CAT/Acquiescence, Not Affirmed, Nigeria (2004). "Although an alien might qualify for withholding of deportation under the INA by showing that public officials would be merely unable or unwilling to prevent torture by private parties, *Mgoian v. INS*, 184 F.3d 1029, 1037 (9th Cir. 1999), INS regulations unequivocally dictate that an alien has no right to withholding of removal under the torture Convention absent evidence of public officials' 'consent or acquiescence.'" (at 1019). The risk of FGM would be at the hands of private individuals would be at the hands of private individuals, not the government.

CAT/Torture, Found, Nigeria (2004). "The *In re J-E-* standard [23 I&N Dec. 291 (BIA 2002) (en banc)] impermissibly prevents aliens from seeking relief under the Torture Convention for claims based on threats of torture when not in official custody. Rather than perpetuate the Board's error by deferring to its misinterpretation of section 208.18, we hold that the Board abused its discretion by transgressing Congress's clearly expressed intent to protect aliens from non-governmental acts of torture committed with public officials' consent or knowing acquiescence." (at 1020).

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- ✱ *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000) (b) (6); treating "implausibility" finding as adverse credibility finding; reversing finding that applicant failed to produce corroborating evidence; granting withholding and remanding for a discretionary grant of asylum; BROWNING, HALL, and SILVERMAN.

Credibility - Pre-REAL ID/IJ Speculation, Not Affirmed, Nigeria (2000). BIA's statement that it was not plausible that applicant at age 18 was leading member of group opposing government abuses, or that he would have continued to post his name on fliers critical of government after being arrested and beaten for writing fliers, were based on unsupported speculation by the IJ.

Credibility/Corroboration Provided (2000). Alien provided reasonable explanation for absence of documents in stating that he was able to gather few items when hastily leaving Nigeria and that it would have been dangerous for him to carry fliers critical of government during escape, alien showed scars received from police beatings, and record contained two reports describing conditions in Nigeria, document explaining mission of alien's organization, and testimony that alien was dedicated member of opposition.

Persecution/Detention, Not Affirmed, Nigeria, (2000); Physical Harm, Not Affirmed, Nigeria (2000); Political Opinion/Found, Nigeria (2000). Alien suffered past persecution on account of political opinion, where on four occasions he was arrested by police, held incommunicado for several days, and tortured because he wrote and distributed fliers critical of government.

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- ✱ *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999) (b) (6); reversing adverse credibility determination and remanding for discretionary grant of asylum; Alien, who was detained and tortured by Nigerian police on account of his involvement in anti-government, pro-democracy student activism and who narrowly escaped being killed by the police and fled the country while the authorities were still searching for him, was eligible for asylum.

REINHARDT; (WIGGINS, dissenting, argued that false statements at entry, being made to U.S. and not to Nigerian officials, should not be explained away).

Credibility/Misrepresentations. Alien's use of a false Canadian passport and his false declaration that he was a Canadian citizen on a visit for pleasure, could not serve as basis for adverse credibility finding; applicant's misrepresentations to immigration officials, in the course of fraudulently entering the United States, were wholly consistent with his claim to be fleeing persecution. Even if asylum applicant lied about his involvement in the forging of Canadian passport or about how he obtained his airline ticket, those acts did not support an adverse credibility determination; as with his fraudulent entry, the alleged conduct concerned facilitating travel and entry into the United States and was "incidental" to applicant's claim of persecution.

Credibility/Corroboration Provided (1999). Alien's affidavit providing an account of his political activities in Nigeria and mistreatment by Nigerian police did not provide a basis for adverse credibility determination; alien's account was sufficiently descriptive of the pertinent events, the supposed discrepancies were minor or non-existent, and alien's act of abandoning his studies and fleeing his country of origin corroborated his testimony as did the general descriptions of the political situation in Nigeria contained in the U.S. Department of State Report and Amnesty International publications.

North Korea

Chronology

✓ *Jang v. Lynch*, 812 F.3d 1187 (9th Cir. 2015)

✓ ***Affirmed***

✓ *Jang v. Lynch*, 812 F.3d 1187 (9th Cir. 2015) (b) (6); denying a petition for review for a denial of asylum. The alien had become a South Korean citizen, lived there for more than four years, “enjoyed a wide range of rights [including unrestricted travel after some time], went to college, got a job, and had family ties.” *Id.* at *3. He argued that he was not “firmly resettled” due to section 302 of the North Korean Human Rights Act of 2004. *Id.* The Circuit analyzed subsection (b) rather than subsection (a) as the BIA did, but reached the same result, finding that section 302 “does not affect the BIA’s conclusion that [the alien] has firmly resettled in South Korea.” *Id.* at *3 n.2, 4. GRABER.

Bars to Asylum/Firm Resettlement, Found, North Korea (2015). The Circuit held that section 302 of the North Korean Human Rights Act (which states that a national of North Korea shall not be considered a national of South Korea for certain asylum purposes) “has no effect on the analysis of whether a North Korean has ‘firmly resettled’ in South Korea (or anywhere else).” *Id.* at *4. Rather, section 302 “simply eliminates a potential dual-nationality barrier to asylum.” *Id.* As such, the firm resettlement analysis is no different for North Korean nationals who have entered South Korea and received some type of permanent residence than it is for other aliens. *See id.*

✗ ***Not Affirmed***

Pakistan

Chronology

- ✖ *Urooj v. Holder*, 734 F.3d 1075 (9th Cir. 2013)
- ✖ *Kaiser v. Ashcroft*, 390 F.3d 653 (9th Cir. 2004)
- ✓ *Hakeem v. INS*, 273 F.3d 812 (9th Cir. 2001)
- ✖ *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000)

✓ *Affirmed*

- ✓ *Hakeem v. INS*, 273 F.3d 812 (9th Cir. 2001) (b) (6); dismissing appeal of one-year filing issue; upholding IJ's denial of withholding; reversing the IJ's adverse credibility determination and viewing the testimony as "wholly credible" (at 816); HALL.

Well-Founded Fear/Continued Family Presence, Pakistan (2001); Return Trips, Affirmed. Alien was not entitled to withholding of removal based on claim he would be persecuted or killed for changing his religion; no one in alien's family had ever been charged, arrested, or physically harmed based on their change in faith, and alien had returned twice to Pakistan and practiced his faith without incident.

Country Reports/To Support Claim, Insufficient, Pakistan (2001). Evidence in the State Department country report that of the 3.5 million Ahmadis in Pakistan, which form a very small portion of the population, 145 Ahmadis are awaiting trial under Pakistani secular blasphemy laws, and that in 1998, 44 Ahmadis were charged under the blasphemy laws, or that Koranic law dictates a death sentence for anyone who changes religions, and that the practice of the religion is subject to criminal sanction, does not compel the conclusion that alien, more likely than not, will be arrested or persecuted under these laws.

Well-Founded Fear/Individualized Risk, Affirmed, Pakistan (2001). "[E]ven for purposes of the less stringent asylum standard, the applicant must show more than the existence of a generalized or random possibility of persecution in his native country." (at 816).

✖ *Not Affirmed*

- ✖ *Urooj v. Holder*, 734 F.3d 1075 (9th Cir. 2013) (b) (6); reversing and remanding an order terminating asylee status. The respondent submitted an affirmative application for asylum which was granted on December 23, 2004. In August, 2005, the lead respondent was again interviewed by a DHS officer as to the claim and she signed a "Record of Sworn Statement" attesting that she had made a false claim in that the events she asserted had in fact not occurred. She then received Notices to Appear and Notices of Intent to Terminate Asylum Status. Apparently, before the IJ, she disputed the allegations made therein. Before the individual calendar hearing, "DHS did not provide notice of its proposed

witnesses or exhibits . . . as required by the Local Operating Procedures of the San Francisco, California Immigration Court.” *Id.* at 1077. “DHS called Petitioner Urooj as a hostile witness and offered the following documents as evidence: (1) Petitioner Urooj’s asylum application; (2) the Record of Sworn Statement; and (3) the record of oath pertaining to her asylum application.” *Id.* “Questions were propounded by DHS, but petitioner Urooj refused to answer” presumably on the basis of her Fifth Amendment protection against self-incrimination. *Id.* “The pivotal legal question . . . is whether DHS can satisfy its burden [under 8 C.F.R. § 1208.24(f)] through impeachment evidence only. Our conclusion is that it cannot.” *Id.* MARSHALL (BYBEE, dissenting).

Evidence/Termination of Asylee Status (2013). “Where, as here, the sole witness refuses to answer questions, DHS cannot satisfy its burden, ‘in the absence of any substantive evidence . . . based solely upon the adverse inference drawn from . . . silence.’” *Id.* (citing *Matter of Guevara*, 20 I&N Dec. 238, 244 (BIA 1990)). The decision rejects the administrative effort to justify its reliance on the above as “impeachment evidence” in that without her testimony, there was “nothing to impeach.” The court cited to *Duvall v. Attorney General*, where again DHS tried to rely on the respondent’s testimony to establish removability, upon refusal to testify it then submitted an application for adjustment of status, “but the IJ ruled it inadmissible for noncompliance with the local rules . . . [and] the IJ terminated the proceedings.” *Id.* at 1078 n.3 (citing 436 F.3d 382 (3d Cir. 2006)). The decision holds that here as well. “The better course in this situation could have been to terminate the proceedings.” *Id.*

* *Kaiser v. Ashcroft*, 390 F.3d 653 (9th Cir. 2004) (b) (6); upholding denial of withholding, reversing denial of asylum and remanding for a discretionary grant; WARDLAW.

Well-Founded Fear/Objectively Reasonable, Found, Pakistan (2004). Asylum applicants established well-founded fear of future persecution if returned to Pakistan; one applicant was placed on political party’s death list, entire family was repeatedly threatened with death, father and son were followed by members of political party on at least one occasion in a fashion similar to that experienced by another ex-military officer before his murder by party, and state department country report suggested that party was active organization that resorted to violence to accomplish goals.

Persecution/Threats, Unfulfilled, Not Affirmed, Pakistan (2004). Fact that none of the threats made against aliens had been carried out did not render fear of future persecution if returned to home country unreasonable; party did not begin threatening family directly until they moved and then frequency and severity of threats increased dramatically, and applicant offered corroborative evidence including State Department country report and numerous articles illustrating party’s willingness to use violence.

Changed Country Conditions/Internal Relocation Not Possible, Pakistan (2004). **Changed Country Conditions/Internal Relocation Not Affirmed; Changed Conditions Not Found, Pakistan (2004).** Areas where applicants had lived peacefully were areas they lived before they began receiving life-threatening phone calls, after that time applicants received threatening phone calls in multiple areas, including in cities on opposite sides of Pakistan. “Because the

threats occurred from one end of Pakistan to the other, we are convinced that there is no area in Pakistan where Petitioners would be free from persecution by the MQM.” (at 660).⁴⁹

- ✱ *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000); reversing denial of asylum on failure to corroborate and finding aliens eligible for asylum; WARDLAW; *declined to extend by Sidhu v. INS*, 220 F.3d 1085 (9th Cir. 2000).

Credibility/Corroboration Not Required, Pakistan (2000). After reviewing the BIA’s interpretation of the regulations requiring corroborative evidence for certain alleged facts pertaining to the specifics of an applicant’s claim, the court states, “We are not free to consider as an open question whether the BIA has hit upon a permissible interpretation of the INA, for the law we must follow is already set out for us: ‘this court does not require corroborative evidence,’ *Cordon-Garcia v. INS*, 204 F.3d 985, 992 (9th Cir. 2000), from applicants for asylum and withholding of deportation who have testified credibly.” (at 899). “We have taken this opportunity to review the extensive and consistent rule on corroboration of our circuit because of the BIA’s apparent adherence to an incompatible rule. We reaffirm that an alien’s testimony, if unrefuted and credible, direct and specific, is sufficient to establish the facts testified without the need for any corroboration.” (at 901).

Evidence/Rejection by IJ. The IJ cannot reject offered evidence as being “self-serving” or “not written contemporaneously.” (at 905).

⁴⁹ In *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012), the Board discussed its view of 8 C.F.R. § 1208.13(b)(1)(i)(B). This was in terms of when past persecution has been established; if asylum is to be denied on the basis of one “could avoid future persecution by relocating to another part of [the] country of nationality” and whether “under all the circumstances it would be reasonable to expect [him] to do so.” In such a situation, DHS has the burden of persuasion. Here, there was a remand so that the IJ would further consider “whether and in what capacity he was in hiding there, whether authorities continued to search for him . . . whether that proposed area is practically, safely, and legally accessible to him.” 26 I&N Dec. at 34. Further factors to be considered in this “balancing test” are: “any ongoing civil strife within the country, administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints; such as age, gender, health, and social and familial ties.” *Id.* at 35.

Palestine

Chronology

✓ *Abufayad v. Holder*, 632 F.3d 623 (9th Cir. 2011)

✓ ***Affirmed***

✓ *Abufayad v. Holder*, 632 F.3d 623 (9th Cir. 2011) (b) (6), amended decision issued on March 16, 2011; affirming a denial of relief. Respondent was born in Saudi Arabia but had generally lived in Gaza prior to coming to the United States and was considered as a “citizen of Palestine.” (at 625). When he attempted to enter the United States with an immigrant visa, he was interrogated by an agent and had his computer thoroughly searched. The search revealed “significant amount of jihadist material, including jihadist videos, audio clips, songs, pictures, rhetoric, training manuals, and justifications of violence . . . hacking programs and stolen credit card numbers.” (*Id.*) (internal citations omitted). Respondent was interviewed and gave inconsistent statements. He conceded having made contributions to “ Hamas social programs.” (at 626). Credibility was not at issue. He denied any explicit terrorist activity. The IJ found him inadmissible as one “likely to engage in terrorist activity” (8 U.S.C. 1182(a)(3)(B)(i)(II)) and for “affording material support to a terrorist organization” under (8 U.S.C. 1182(a)(3)(B)(i)(i)). The IJ then granted deferral of removal to Palestine under CAT. On appeal, the Board upheld the removability findings but reversed the grant of relief under CAT. GOULD.

Bars to Asylum/Terrorist Bar, Affirmed, Palestine (2011). Both parties presented substantial documentary and testimonial evidence as well as contrasting expert opinion. The administrative finding was upheld. The circuit found that the “‘reasonable ground to believe standard’ in the removal context is similar to the ‘probable cause’ standard.” (at 630) (citing *Malkandi v. Holder*, 576 F.3d 906, 914 (9th Cir. 2009)). The Government had met its burden to show that Respondent was likely to engage in terrorist activity upon entry.

Credibility - Post-REAL ID/REAL ID Standard. Although this was a REAL ID Act case, there was no discussion thereunder. Respondent argues that since there was no adverse credibility determination, his “portrayal of the facts must be accepted as true.” The circuit held “We decline to extend its application to contexts where such an adjustment to normal evidentiary burdens is not warranted.” (at 631).

CAT/More Likely Than Not, Not Found, Palestine (2011). The circuit distinguished *Hosseini v. Gonzalez*, 471 F.3d 953 (9th Cir. 2007), where it had reversed a denial of CAT relief for a respondent from Iran, who had similarly expressed fear that he would be falsely accused of having terrorist ties with an organization opposed to his country of origin. Here, the circuit construed “Palestine” to be the “Palestine Authority” (PA), rather than the Hamas government in Gaza. The circuit based its affirmance on general State Department reports (and not reports

from Amnesty International), that neither Israel nor the PA has been shown to objectively pose the risk feared by the respondent to the degree necessary to be “more likely than not.”

✕ *Not Affirmed*

Peru

Chronology

- ✖ *Soto-Olarte v. Holder*, 555 F.3d 1089 (9th Cir. 2009)
- ✓ *Miranda v. Gonzales*, 441 F.3d 750 (9th Cir. 2006)
- ✖ *Canales-Vargas v. Gonzales*, 441 F.3d 739 (9th Cir. 2006)
- ✖ *Cardenas v. INS*, 294 F.3d 1062 (9th Cir. 2002)
- ✖ *Salazar-Paucar v. INS*, 281 F.3d 1069 (9th Cir. 2002)
- ✓ *Cruz-Navarro v. INS*, 232 F.3d 1024 (9th Cir. 2000)
- ✖ *Vera-Valera v. INS*, 147 F.3d 1036 (9th Cir. 1998)
- ✖ *Velarde v. INS*, 140 F.3d 1305 (9th Cir. 1998)
- ✖ *Meza-Manay v. INS*, 139 F.3d 759 (9th Cir. 1998)
- ✖ *Gonzales-Neyra v. INS*, 122 F.3d 1293 (9th Cir. 1997)

✓ Affirmed

- ✓ *Miranda v. Gonzales*, 441 F.3d 750 (9th Cir. 2006) ((b) (6)); upholding denial of asylum and withholding of removal on the basis that the respondent was found to be a “persecutor” under 8 U.S.C. § § 1158(b)(2)(A)(i) and 1231(b)(3)(B)(i); BERZON, concurrence by LEAVY.

Bars to Asylum/Persecutor Bar, Found, Peru (2006). Mr. Miranda had served as an interpreter during his service in the Peruvian Civil Guard. He received orders to assist other officers as such in their interrogation of individuals suspected of being associated with the Shining Path guerrilla organization. During many of these interrogations the suspects were subjected to brutal punishment in his presence. He performed this service “two to three times a month for seven years.” He made clear “that he was unable to influence the torture.” He stated that if he did not do as directed that “it would have affected his performance rating and he would not have been promoted.” The opinion reviews a significant number of decisions. In making the determination it is appropriate to look at: “the length of time over which the person was involved in the acts, the kind of threats used to compel assistance, and the efforts or the lack thereof...to escape.” “This statute does not require actual trigger pulling... but mere acquiescence or membership in an organization is insufficient to satisfy the persecutor exception.” There is a need to distinguish “between active and passive conduct.” *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985) is limited so as not to require “a persecutor to personally inflict injury.” Thus, individuals are only ineligible for asylum if they have provided purposeful, material assistance for the acts of persecution. The touchstone of the “assistance” analysis is the degree to which the applicant’s conduct was central, or integral, to the relevant persecutory acts. The panel agreed with the IJ’s assessment that the respondent was “a necessary part of the interrogation” or as otherwise stated, “he performed an integral role in facilitating the persecution.” There was no claim of acting in “self-defense” as in *Vukmirovic v.*

Ashcroft, 362 F.3d 1247 (9th Cir. 2004) where the persecutor bar was not applied. The panel found the conduct in this case to be “at a margin of the culpability required under the statute.” It notes, “Miranda was not in a position of authority, ...he did not apply the electric shock or beatings, he did not apply the physical compulsion, ...he did not... arrest the victims or bring them to the place of torture.”⁵⁰

Persecution/Threats, Affirmed, Peru (2006); Property Damage, Peru (2006). As a result of his service in the Peruvian Civil Guard, he received various threats from the Shining Path and his “wife and children had been visited by masked men who stole his police uniforms and painted or posted Shining Path slogans on the walls.” When he thereafter relocated his wife and children, they made further threats, vandalized his property and poisoned his dog. There was no issue of credibility.

Administrative Proceedings/No Chevron Deference. The panel engaged in a lengthy discussion that in the words of the concurrence was “irrelevant” in holding that there is no *Chevron* deference to any conclusion of law by an IJ even when the Board affirms without opinion. “An IJ decision, although presented as the final agency determination to be reviewed in federal court, is not legally relevant to any future decision-making including by the very IJ who issued it.”

Board of Immigration Appeals/Inconsistent Administrative Decisions. “Inconsistent results can . . . implicate constitutional concerns. Citing to *Njuguna v. Ashcroft*, 374 F.3d 765, 771 (9th Cir. 2004) (“it is a foundation of the rule of law that similarly situated individuals be treated similarly”; criticizing inconsistent treatment of asylum applicants) or *Wang v. Ashcroft*, 341 F.3d 1015, 1019 (9th Cir. 2003) rejecting a denial of asylum for a woman after noting that her husband had been granted such. It is noted that the inconsistencies cited were in unpublished administrative decisions.

Nexus/Mixed Motive, Pre REAL ID, Peru (2006); Persecution/Prosecution, Affirmed, Peru (2006). The fact that the authorities were trying to control a violent terrorist group did not mean that their conduct could be excused. “By legitimate our case law refers to a persecution that was not tainted *even in part* [emphasis in original] by impermissible motives corresponding to a ground under the INA. Citing to *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. en banc 1999).⁵¹

⁵⁰ In *Negusie v. Holder*, 129 S.Ct. 1159 (2009), the Supreme Court rejected the proposition that the “persecutor bar applies even if the alien’s assistance in persecution was coerced or otherwise the product of duress.” The court rejected the Board’s reliance on *Fedorenko v. United States*, 449 U.S. 490 (1981) for the proposition that “an alien’s motivation and intent are irrelevant to the issue of whether he ‘assisted’ in persecution . . . it is the objective effect of an alien’s actions which is controlling.” In this case, the alien had served as an armed prison guard for four years. “He also guarded prisoners to make sure that they stayed in the sun which he knew was a form of punishment. He saw at least one man die after being in the sun for more than two hours.” Respondent claimed that he was coerced into performing his service.

⁵¹ The First Circuit has issued three published decisions in *Castenada-Castillo v. Holder*, 638 F.3d 354 (1st Cir. 2011); 464 F.3d 1112 (1st Cir. 2006); and 488 F.3d 17 (1st Cir. 2007) (en banc). Mr. Castenada had served as a commanding officer in the Peruvian army of a sub-component which had engaged in the massacre of civilians during its conflict with the Shining Path guerrillas. He had been personally accused of being involved with the commission of atrocities but was ultimately acquitted.

In the most recent decision, the circuit explained that the previous holding “requires that the asylum seeker have prior or contemporaneous knowledge that the effect of his or her actions is to assist in persecution.” As the en banc circuit had held, “the term ‘persecution’ strongly implies both scienter and

illicit motivation.” In rejecting a claim that it is up to the respondent to demonstrate that he is not a persecutor; if there is a reasonable basis to believe he may be such: “Nor is it an excuse for dispensing with scienter that knowledge may be hard for the government to prove.” The circuit rejected the government’s efforts to persuade it to adopt either the “objective effect” of the accused’s actions or the “totality of the relevant conduct” test in making that evaluation.

In the first case, *Castaneda-Castillo*, the First Circuit refused to apply the persecutor bar, stating, “the term ‘persecution’ strongly implies both scienter and illicit motivation” *Id.* at 20. “Nor is it an excuse for dispensing with scienter that knowledge may be hard for the government to prove.” *Id.* at 21. The court rejected the government’s efforts to persuade the court to adopt either the “objective effect” of the accused’s actions or the “totality of the relevant conduct” test in making that evaluation. *Id.* at 21-22. In *Xu Gao v. U.S. Attorney General*, 500 F.3d 93 (2d Cir. 2007), the court rejected an administrative decision which denied relief on the basis of finding the respondent to have been a “persecutor.” He had served as the chief inspector of a government organization in China which inspected booksellers and could refer inappropriate activities by them to the Public Security Bureau for action. Even assuming the organization engaged in “persecution,” to apply the bar to the respondent himself required more than showing his position in the organization. Rather, it had to be shown that he personally had assisted in the persecution or had direct influence or control over arrests leading to persecution. “The record must first reveal an identifiable act of persecution in which the [respondent] allegedly assisted.” *Id.* at 100. The court agreed with *Castaneda* for the proposition that the government had to show some level of culpable knowledge that the consequences of one’s actions would assist in acts of persecution. “[M]ere membership in an organization, even one which engages in persecution is not sufficient to bar one from relief, but only if one’s action or inaction furthers that persecution in some way”. *Matter of Rodriguez- Majano*, 19 I & N Dec. 811, 814-15 (BIA 1988). In a lengthy analysis of the persecutor bar in *Balachova v. Mukasey*, 547 F.3d 374 (2d Cir. 2008), the court rejected the administrative finding of such. It held that the government must demonstrate “several elements.” There need not be “persecution” and this should be viewed as the same way as “persecution” is defined as to one “who is a refugee.” There must be a demonstrated “nexus” between “the persecution and the victim’s” protected status. There must be sufficiently voluntary and knowing action. Such must not be “tangential to the acts of oppression” and “the alien must have sufficient knowledge that his or her actions may assist in persecution to make those actions culpable.” Applying these standards to the case, the court held “the IJ appears to have confused illegality with persecution.” Further, notwithstanding the fact that women had been raped with at least the alleged complicity of the Respondent, the government had failed to show that the Respondent’s acts were not “tangential,” had no “direct consequences to the victims” and that “failing to prevent persecution can constitute persecution.”

In *Diaz-Zanata v. Holder*, 558 F.3d 450 (6th Cir. 2009), the Sixth Circuit refused to apply the persecutor bar. The respondent worked for several years as an “intelligence analyst” for a branch of the Peruvian military that was involved in brutal human rights violations. The IJ found that her assistance thereto was “an important part of operating this process,” referring to the services that she rendered to obtain information about suspected anti-government activities by individuals and passing the information up “the chain of command,” resulting in the persecution of others. The court reviewed a number of decisions, and in doing so emphasized a “knowledge or scienter requirement” and “actual connection between the actions of the alien and persecution of others.” The court found that serving as “mere membership” in an organization that persecutes others will not suffice. In its instructions on remand, the court held “It is not enough that information [she] collected . . . was used to persecute individuals if [she] had no prior or contemporaneous knowledge of that; neither is it enough that [she] knew that persecutions were taking place, if information [she] collected and relayed to the military were not used in those persecutions.”

In *Weng v. Holder*, 562 F.3d 510 (2d Cir. 2009), the court reversed a finding of “persecutor” status regarding a medical assistant who voluntarily took on government employment to provide care to

Civil Strife/Claims Arising in Context Of, Peru (2006). The fact that there was general violence in Peru was also found not to justify the conduct. Again the court cited case law to support the position that “persecution occurred at least in part as a result of an applicant’s protected status.” *Ndom v. Ashcroft*, 384 F.3d 743, 755 (9th Cir. 2004); *Briones v. INS*, 175 F.3d 727, 729 (9th Cir. 1999 en banc); *Gomez-Saballos v. INS*, 79 F.3d 912, 917 (9th Cir. 1996). The panel held, “engaging in military actions, the attacking of garrisons, the burning of cars, and the destruction of other property as actions outside the limits of the term persecution... unlike the sort of on-the-battlefield conflict... torturing individuals selected for their affiliation with an opposition group is not inherent in armed conflict.”⁵²

- ✓ *Cruz-Navarro v. INS*, 232 F.3d 1024 (9th Cir. 2000) (b) (6)); upholding denial of asylum; (1) applicant’s persecution was not “on account of” his membership in protected social group; (2) his persecution was not “on account of” affirmative political opinion; and (3) his persecution was not “on account of” implied political opinion; petition denied; TASHIMA.

women who had been obligated to go through coercive family practices in China. The court found that although this post-procedure medical care may well have been necessary for the women’s recovery, there had not been an adequate showing under *Balachova* to demonstrate the requisite link between the activity and the respondent to disqualify him from asylum. In *Lin v. Holder*, 584 F.3d 75 (2d Cir. 2009), the circuit again rejected the proposed application of the persecutor bar to one who had generally assisted in what would be considered persecutive activity. Respondent had worked in a maternity ward in a Chinese hospital where some of the women were subjected to coercive family planning practices and respondent participated in assisting the examinations of all of the patients, including such individuals. The Board found that it was the respondent’s burden to disassociate herself with the improper activity and that she had not done so. The circuit disagreed and found that the denial failed because the government had not shown that respondent acted in a “direct” or “active” way with regard to the implementation of coercive family planning practices.

⁵² In *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) the Board found an LPR removable under section 237(a)(4)(D) pertaining to “acts of torture or extra-judicial killing.” This respondent had served as “a special police officer” in Bosnia at the time of intense civil war after the breakup of Yugoslavia. He had served as a platoon leader of “about 25 special police officers.” He denied any misconduct. DHS offered a number of documentary materials specific to his component being in close proximity at several massacres of innocent people. There was also the exculpatory testimony of its expert who had worked as a military analyst for the UN entity which had been charged with investigating and prosecuting war crimes committed during that conflict. It had issued a warrant for respondent’s arrest. It had found that the respondent’s unit “must have been well aware of the fact that executions” of civilians “given their proximity to the area and the noise and high levels of activity associated with the massive scale of the executions.” Further, this had been based on his being charged as that he “knew that his subordinates took part in the execution of detainees.” *Id.* at 454.

The decision holds that removability: “is established where it is shown that an alien with command responsibility knew or should have known that his subordinates committed unlawful acts covered by the status and failed to prove that he took reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators.” 25 I&N Dec. at 453. Respondent’s claim of ignorance was properly rejected based on the above as well as “his testimony was contradicted on multiple occasions” by other documentary material. *Id.* at 455.

Nexus/Motive Not Found, Pre REAL ID (2000); Political Opinion/Not Found, Peru (2000). Persecution of Peruvian police officer by suspected members of guerilla organization was not “on account of” officer’s affirmative political opinion; officer did not testify that he had particular political beliefs or opinions, he did not choose to work on cases involving arrest of guerillas, and he did not testify that he expressed any political beliefs to his persecutors.

Nexus/Motive Not Found, Pre REAL ID, Peru (2000); Political Opinion/Imputed, Not Found, Peru (2000). Persecution of Peruvian police officer by suspected members of guerilla organization was not “on account of” imputed political opinion; guerillas referred to officer as “policeman” and “informer” when attacking him, and neither reference implied they believed he held political beliefs contrary to theirs. “While the guerillas may have regarded Cruz as an informant, this is not akin to imputing a political belief to him. *See [Sangha v. INS, 103 F.3d 1482, 1489-90 (9th Cir. 1997)]* (holding that applicant failed to establish imputed political opinion where he presented no evidence that an anti-governmental guerilla group imputed his father’s political beliefs to him).” (at 1030).

✕ *Not Affirmed*

- ✕ *Soto-Olarte v. Holder, 555 F.3d 1089 (9th Cir. 2009)* (b) (6); reversing and remanding a claim based on what was found to be an impermissible adverse credibility determination. A police report heavily relied upon by the respondent had material inconsistencies with the testimony. GOULD.

Credibility - Pre-REAL ID/Inconsistencies, Material, Not Affirmed, Peru (2009); Opportunity to Explain. In order to sustain an adverse credibility determination there must be shown to exist a material inconsistency, the alien must have been given the opportunity to explain such, and the IJ must give reasonable “reasons for finding that explanation unpersuasive.”

Credibility - Pre-REAL ID/Adverse Determination to Deny Claim. The administrative determination was also based on an alternate finding that the key incident complained of was a “robbery” unconnected to a protected ground for relief. This was not accepted in that “its explicit reasoning relied on an adverse credibility determination that we have determined is not supported by substantial evidence.”

- ✕ *Canales-Vargas v. Gonzales, 441 F.3d 739 (9th Cir. 2006)* (b) (6); reversing and remanding a denial of asylum. The respondent reported a series of threats in 1990 from the Shining Path after “she gave a speech denouncing the terrorist group.” The panel did not find past persecution; PREGERSON; (KOZINSKI, dissenting, criticizing the “majority in interfering yet again with the IJs to do their jobs” and “The majority’s opinion can only be read to announce a per se rule that any death threat from a group capable of carrying through on it requires a finding that the petitioner’s fear of persecution is well founded.”).

Well-Founded Fear/Ten Percent Rule, Not Affirmed, Peru (2006). In a graphic example of how easy it is under Ninth Circuit case law to establish the “low standard” of the ten percent chance

of future risk, the majority was not willing to uphold the denial by the “age of the threats,” their anonymity, nor by the fact that there was no claim that there had been any effort by the Shining Path to “personally confront or physically harm” her nor by the “seven months” she remained in Peru.

Persecution/Threats Alone, Not Affirmed, Peru (2006). “In asylum and withholding of deportation cases we have consistently held that death threats alone can constitute persecution.” Citing *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000), *Mashiri v. Ashcroft*, 383 F.3d 1112, 1119 (9th Cir. 2004), and twelve other Ninth Circuit cases. The Ninth Circuit found the Shining Path to have “ruthless efficiency in persecuting its political opponents” and that “it remains a terrorist group involved in numerous human rights abuses.” In doing so it did not rely on information more current than from 1995.

Withholding of Deportation/Denied, Peru (2006). The Ninth Circuit upheld the denial on this request. It emphasized the difference in terms of evidentiary burden between the well founded fear standard and this request.

Ineffective Assistance/Ineffective Assistance Found. The respondent’s attorney had “cut and pasted into the brief” a portion of a prior brief that was not at all relevant to this case. “Of course we do not hold the sloppiness of [respondent’s] attorney against [respondent] herself.”

- * *Cardenas v. INS*, 294 F.3d 1062 (9th Cir. 2002) ((b) (6)); reversing denial of asylum and withholding, and remanding; REINHARDT; (GRABER, dissenting, agreed with the BIA that internal relocation was reasonable: “The majority relies on a single telephone message to support its conclusion that the record *compels* a finding that Petitioner had a well-founded fear of future persecution, despite the absence of past persecution.” (at 1068)).

Past Persecution/Internal Relocation Possible, Peru (2002); Country Reports, Use Of Permitted, Peru (2002). When viewed in the light of the past threats made against him by terrorist organization actively engaged in political persecution (Shining Path), final threat that asylum applicant would not be safe anywhere in Peru necessitated a finding of a well-founded fear of persecution; that applicant was able to relocate within country for six months prior to receiving the final threat did not militate against such finding, particularly in light of State Department report of organization’s extensive and ongoing impact.

Persecution/Threats, Not Affirmed, Peru (2002); Withholding of Deportation/Granted, Peru (2002). Alien was entitled to withholding of deportation upon showing of a well-founded fear of future persecution, and that it was more likely than not that he would be persecuted if he were to return to Peru, because he had received a direct threat from a terrorist organization that was actively engaged in political persecution.

Well-Founded Fear/Continued Applicant Presence, Peru (2002). “[T]hat Cardenas was able to live in Canete for six months prior to receiving the final threat does not affect our conclusion. We have found that a ‘post-threat harmless period’ of far longer than that did not vanquish an asylum claim. In *Lim v. INS*, 224 F.3d 929, 935 (9th Cir. 2000)], the petitioner, who claimed asylum on the basis of persecution in the Philippines, was able to live in the country without harm for six years after receiving a series of death threats, yet we found that Lim established a well-founded fear of persecution. 224 F.3d at 935. Here, Cardenas was able to relocate for only six months before he received a threat in which the Shining Path asserted that his relocation

would be no obstacle to their harming him. Certainly, this would establish that it would be neither safe nor reasonable for him to relocate within the country.” (at 1067).

- ✱ *Salazar-Paucar v. INS*, 281 F.3d 1069 (9th Cir. 2002) (amended on denial of reh’g by 290 F.3d 964 (9th Cir. 2002)); reversing denial of asylum and withholding; remanding for a grant of asylum and withholding; PAEZ.

Persecution/Threats, Not Affirmed, Peru (2002); Of Family, Not Affirmed, Peru (2002). Death threats by the Shining Path guerrillas in Peru, combined with the harm to members of applicant’s family and the murders of his political counterparts constituted past persecution.

Past Persecution/Failure to Rebut, Peru (2002); Past Persecution/Changed Conditions Not Found, Peru (2002). INS failed to rebut presumption of a well-founded fear of persecution arising from proof that asylum applicant received death threats from the Shining Path guerrillas in Peru; it was nothing but speculation that Shining Path were no longer interested in applicant because seven years had passed since applicant left Peru, six of which were due to the administrative delay in ruling on applicant’s asylum claim.

- ✱ *Vera-Valera v. INS*, 147 F.3d 1036 (9th Cir. 1998) (withdrawing and superseding 123 F.3d 1302 (9th Cir. 1997) on reh’g); reversing denial of asylum based on imputed political opinion; SCHROEDER; (KLEINFELD, concurring, found an actual political opinion rather than an imputed one).

Political Opinion/Found, Peru (1998). Threats made by members of Sendero Luminoso guerilla organization against alien while he served as president of Peruvian street vendors’ cooperative, arising from his support of construction of permanent building for vending, were on account of imputed political opinion, and thus were basis for refugee status; Sendero Luminoso opposed construction project, and government supported such project, because the presence of street vendors facilitated guerillas’ ability to hide and disseminate political information.

Political Opinion/Imputed, Found, Peru (1998). “Imputed political opinion exists where one party to a conflict insists to the victim that the victim is aligned with the other side.” (at 1039).

- ✱ *Velarde v. INS*, 140 F.3d 1305 (9th Cir. 1998) (b) (6); reversing denial of withholding and remanding; alien’s claim “is no less compelling than other successful claims brought by former police and army officials . . . and by other former holders of ‘politically-charged’ positions;” B.FLETCHER; review of discretionary determinations superseded by IIRIRA, accord *Falcon-Carriche v. Ashcroft*, 350 F.3d 845, 854 n.9 (9th Cir. 2003).

Withholding of Deportation/Granted, Peru (1998). Finding of BIA, that alien failed to demonstrate threatened harm based on political opinion or imputed political opinion upon being returned to Peru, and that she thus was not entitled to withholding of deportation, was not supported by substantial evidence; alien testified that, because she was former bodyguard to daughters of Peru’s president, she had received package bomb, had been victim of kidnap attempt, and had been threatened by Shining Path guerilla organization.

Political Opinion/Imputed, Found, Peru (1998). “Velarde’s claim of likely persecution by Sendero Luminoso on account of her imputed political opinion as a former security guard for the Presidential family is no less compelling than other successful claims brought by former police and army officials, *see Artiga Turcios*, 829 F.2d 720, 724 (9th Cir. 1987) (directing the BIA to grant withholding of deportation to former soldier based on clear probability of persecution on account of imputed political opinion by guerrillas in El Salvador); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1287–88 (9th Cir. 1984) (same), and by other former holders of ‘politically-charged’ positions, *see Gomez-Saballos v. INS*, 79 F.3d 912, 918 (9th Cir. 1996) (directing the BIA to grant withholding of deportation to former prison director based on clear probability of persecution on account of imputed political opinion by guerrillas in Nicaragua). Accordingly, we conclude that the BIA’s decision not to withhold deportation lacks the support of substantial evidence.” (at 1313).

- ✱ *Meza-Manay v. INS*, 139 F.3d 759 (9th Cir. 1998) (b) (6); reversing denial of asylum and remanding; (1) alien was persecuted by Shining Path guerilla organization on account of actual or imputed political opinion, and (2) that alien had been divorced from her husband and that he no longer worked for police force was insufficient to overcome presumption that alien had well-founded fear of persecution; PREGERSON; *distinguished by Belayneh v. INS*, 213 F.3d 488 (9th Cir. 2000).

Political Opinion/Imputed, Found, Peru (1998); Political Opinion/Found, Peru (1998); Persecution/Of Family, Not Affirmed, Peru (1998); Property Damage, Peru (1998). Alien was persecuted in Peru on account of actual or imputed political opinion; alien opposed Shining Path guerilla movement because of its communist principles, friends and co-workers referred to her as a spy because of her husband’s role in capturing guerilla leaders, and Shining Path attempted to kill her on two occasions, attempted to kill her children, bombed her in-laws’ home, and abducted and killed her husband’s brother.

Past Persecution/Failure to Rebut, Peru (1998). That alien was being divorced from her husband and that he no longer worked for police force was insufficient to overcome presumption that alien had well-founded fear of persecution upon return to Peru, where her husband had been victim of violent attacks by Shining Path guerilla movement; alien was personally targeted for her own political beliefs, and her divorce would not alter her own political opinions or her alleged status as spy for Peruvian government.

- ✱ *Gonzales-Neyra v. INS*, 122 F.3d 1293 (9th Cir. 1997) (as amended by 133 F.3d 726 (9th Cir. 1998) (b) (6)); reversing denial of asylum and withholding; remanded; SCHROEDER.

Political Opinion/Found, Peru (1997); Persecution/Extortion. Alien established he was persecuted on account of political opinion, in view of guerillas’ threats to alien’s business and his life after they learned of his political opposition to guerrillas’ cause; fact that guerillas’ initial extortion demands had economic motivation was not dispositive.

Nexus/Motive Found, Pre REAL ID, Peru (1997). “[Applicant] provided evidence that he was persecuted, that he had a political opinion, that he expressed it to his persecutors, and that they

threatened him only after he expressed his opinion. We therefore conclude that petitioner proved through compelling and undisputed evidence that the threats to his life and business constituted persecution causally connected to his political opposition to the Shining Path.” (at 1296).

Philippines

Chronology

- ✓ *Go v. Holder*, 744 F.3d 604 (9th Cir. 2014)
- ✗ *Vitug v. Holder*, 723 F.3d 1056 (9th Cir. 2013)
- ✓ *Pagayon v. Holder*, 642 F.3d 1226 (9th Cir. 2011)
- ✓ *Go v. Holder*, 640 F.3d 1047 (9th Cir. 2011)
- ✓ *Soriano v. Holder*, 569 F.3d 1162 (9th Cir. 2009)
- ✗ *Silaya v. Mukasey*, 524 F.3d 1066 (9th Cir. 2008)
- ✓ *Rivera v. Mukasey*, 508 F.3d 1271 (9th Cir. 2007)
- ✗ *Marcos v. Gonzales*, 410 F.3d 1112 (9th Cir. 2005)
- ✗ *Deloso v. Ashcroft*, 393 F.3d 858 (9th Cir. 2005)
- ✗ *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2003)
- ✗ *Mejia v. Ashcroft*, 298 F.3d 873 (9th Cir. 2002)
- ✓ *Valderrama v. INS*, 260 F.3d 1083 (9th Cir. 2001)
- ✓ *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001)
- ✓ *Pondoc Hernaez v. INS*, 244 F.3d 752 (9th Cir. 2001)
- ✗ *Agbuya v. INS*, 241 F.3d 1224 (9th Cir. 2001)
- ✗ *Lim v. INS*, 224 F.3d 929 (9th Cir. 2000)
- ✗ *Colmenar v. INS*, 210 F.3d 967 (9th Cir. 2000)
- ✗ *Grava v. INS*, 205 F.3d 1177 (9th Cir. 2000)
- ✗ *Tarubac v. INS*, 182 F.3d 1114 (9th Cir. 1999)
- ✗ *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999)
- ✗ *Briones v. INS*, 175 F.3d 727 (9th Cir. 1999)
- ✗ *Garrovillas v. INS*, 156 F.3d 1010 (9th Cir. 1998)

✓ *Affirmed*

- ✓ *Go v. Holder*, 744 F.3d 604 (9th Cir. 2014) ((b) (6)); upholding the denial of an MTR with regard to a new CAT claim. The respondent had previously had his claim denied administratively as well as by the Ninth Circuit in unpublished decisions. The new CAT claim was based on “new and previously unavailable evidence” that called into question the veracity of a witness’ testimony upon which, in part, the denials had been based. There was the argument that the limitations on motions to reopen set forth at 8 C.F.R. § 1003.2(c) do not apply to CAT claims give their not being specifically addressed. WALLACE

Motion to Reopen/Newly Discovered Evidence, Denied, Philippines (2014). The court cited some of its unpublished case law for the proposition that the failure to specifically mention CAT claims in the MTR limitation does not make it inapplicable thereto.

Motion to Reopen/Changed Country Conditions, Denied, Philippines (2014). In upholding the denial, the court notes that not only must such be shown; but that this must be “material” to the claim. The decision finds that the Board “did not abuse its discretion” in that the “record ‘already contained generalized evidence suggesting a relatively high level of abuse and mistreatment in the Philippines’” with regard to returned individuals who might be in a similar situation of that of the respondent. 744 F.3d at 609.

Motion to Reopen/Sua Sponte. The court restates its case law, including *Sharma v. Holder*, 633 F.3d 865, 874 (9th Cir. 2011), citing that “we lack the jurisdiction to review the Board’s decision” under 8 C.F.R. 1003.2(a).

- ✓ *Pagayon v. Holder*, 642 F.3d 1226 (9th Cir. 2011), *reh’g en banc denied*, (b) (6); affirming a denial of relief. Credibility was not at issue. *Id.* at 1230. Respondent’s “father had worked as an investigator for the Philippines’ National Bureau of Investigation. He was shot to death . . .” *Id.* Family members opined that “his father had been murdered by members of the National Police (NP) in the course of an investigation into the NP’s involvement in crime syndicates.” *Id.* Members of the NP were seen “patrolling around his grandmother’s house;” someone made threats, and when his aunt tried to “bring the circumstances of her brother’s death to light, she was shot.” *Id.* There were further threats and acts of harassment warning the family that “NP retaliation was imminent.” *Id.* Respondent “opined that he could not return to the Philippines because those responsible for his father’s murder would find out and ‘assume that [he was] back for revenge [or] to expose them from whatever scheme they’re doing.’” *Id.* at 1231 (brackets in original). PER CURIAM.

Particular Social Group/Family, Affirmed, Philippines (2011). In upholding the denial, the court found that Respondent had “not demonstrated that he would face reprisals from the NP,” noting that his sister remains in the Philippines “unmolested.” *Id.* at 1235. The court found that “[a]lthough Pagayon casts his claim as one based on imputed political opinion, his narrative . . . described the NP’s motive as an attempt to discourage his family from exposing or avenging his father’s murder.” *Id.* “A personal dispute is not, standing alone, tantamount to persecution based on an imputed political opinion.” *Id.* (referencing *Molina-Morales v. INS*, 237 F.3d 1048, 1051-52 (9th Cir. 2001) (“personal disputes [are] not grounds for asylum unless connected to a protected ground”).

Due Process/IJ Refusal to Receive Evidence, Affirmed. The court held that the IJ’s refusal to receive proposed supplemental evidence was not prejudicial because credibility was assumed. *Id.* at 1236.

Political Opinion/Whistleblowing, Affirmed, Philippines (2011). Notwithstanding what may have been described as a whistle-blowing campaign against governmental corruption, the court concluded that the case was about “a personal vendetta against someone intending to expose the NP’s misdeeds.” *Id.* “Although Pagayon casts his claim as one based on imputed political opinion, his narrative to the IJ described the NP’s motive as an attempt to discourage his family from exposing or avenging his father’s murder. A personal dispute is not, standing alone, tantamount to persecution based on an imputed political opinion.” *Molina-Morales v. INS*, 237 F.3d 1048, 1051-52 (9th Cir. 2001).

Conviction/Reliance on Admission, Affirmed. The court found it permissible to establish removability based on Respondent's admission that he had been convicted of possession of methamphetamine because it linked the conviction in the abstract of judgment to the drug charge for possession of methamphetamine in the information. *Id.* at 1234. This was found to be permissible in that the admission was made at the "pleading" stage as opposed to "evidentiary" stage as allowed under *Perez-Mejia v. Holder*, 663 F.3d 403 (9th Cir. 2011).

- ✓ *Go v. Holder*, 640 F.3d 1047 (9th Cir. 2011) (b) (6); affirming the denial of relief. Respondent expressed fear on the basis that he "would be subject to a sham criminal prosecution in the Philippines [because] . . . he and his wife had been falsely charged with kidnapping . . . a member of a prominent family." (at 1050). Moreover, "Go testified that he had become involved in a drug-trafficking organization operated [by the member of the prominent family]" along with other criminal activity with the purported victim. (*Id.*). "Relying on Go's admission to being involved in an illegal drug-trafficking scheme, the IJ found him statutorily ineligible for asylum and withholding of removal." (*Id.*). The basis of the CAT claim was that "Go averred that he would be subject to torture if he were held in a Philippine detention facility pending his trial for kidnapping." (*Id.*). WALLACE.

Bars to Asylum/Crime outside of the US. "The INA bars an applicant from obtaining asylum and withholding relief when "there are serious reasons" to believe that he or she "committed a serious nonpolitical crime" before arriving in the United States. 8 U.S.C. §§ 1158(b)(2)(A)(iii) (asylum), 1231(b)(3)(B)(iii) (withholding). We interpret " 'serious reasons' to believe" as being tantamount to probable cause." *See, McMullen v. INS*, 788 F.2d 591, 599 (9th Cir.1986), overruled on other grounds by *Barapind v. Enomoto*, 400 F.3d 744, 751 n. 7 (9th Cir.2005) (en banc) (per curiam). The circuit upheld the decision in that "Because a 'particularly serious crime' is more serious than a 'serious nonpolitical crime,' it follows that drug trafficking is presumptively a serious offense." (at 1052). A political aspect to the crime was not found, nor was the "grossly out of proportion to the political objective" exception met. *See, INS v. Aguirre-Aguirre*, 526 U.S. 415, 429 (1999). The bar could be based on admissions to the details of the criminal activity. *See, United States v. Brady*, 819 F.2d 884, 889 (9th Cir.1987) (admissions constitute probable cause).

CAT/More Likely Than Not, Not Found, Philippines (2011). In upholding the administrative decision, the circuit found that the BIA had fairly evaluated the conflicting evidence and that "even when an alien's testimony is credited, an immigration court may also consider the other evidence contained in the record" to justify the denial. *See, Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir.2005).

- ✓ ***OVERRULED BY *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013).***
Soriano v. Holder, 569 F.3d 1162 (9th Cir. 2009) (b) (6)⁵³; affirming a denial of relief primarily on the claim that "government informants" should not be deemed to be

⁵³ In *Henriquez-Rivas v. Holder*, 449 F. App'x 626 (9th Cir. 2011) in an unpublished decision the court upholds the denial of relief by applying *Soriano* and *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 (9th Cir. 2010) (finding that material witnesses for the U S government's prosecution of alien smugglers do not constitute a particular social group (PSG). Judge Bea in a lengthy concurrence writes about the "ambiguous" case law and in particular cites with approval *Gatami v. Holder*, 578 F.3d 611, 615 (7th Cir.

members of a PSG. Credibility was not at issue. Respondent did not claim any physical violence. He reported fear on the basis that he had been a member of a criminal gang and informed on them in return for lenient treatment from the criminal justice authorities. He asserted that gang members had already been “looking for him” and wanted to know “when he would be deported.” GRABER.

Political Opinion/Imputed, Not Found, Philippines (2009). The court would not find any imputed political opinion notwithstanding the respondent having acted against the criminal gang. The “fear of future persecution stems from the criminals’ motive to retaliate against him for informing on them. Personal animosity is not a political opinion.”

Particular Social Group/Informant. The court finds the proposed ground not to be sufficiently “cohesive, homogenous” nor to have any “innate characteristic which is so fundamental to the identities or consciences of government informants that identifies them as a PSG.”

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- ✓ *Rivera v. Mukasey*, 508 F.3d 1271 (9th Cir. 2007) ((b) (6)); affirming a denial of asylum and related relief on credibility grounds. The respondent complained of persecution. A first merits hearing was held in 1997. On appeal, the Board found that she had received ineffective assistance of counsel and remanded for another hearing. The second merits hearing was held in 2004 and again resulted in a denial of relief. BEEZER.

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, Philippines (2007); Translation. “The IJ determined that Rivera’s testimony was not credible because of the numerous inconsistencies between her 1997 and 2004 testimony.” (at 1274). This was so notwithstanding that “Rivera attempted to explain why her 1997 testimony had been inaccurate, stating that she was confused, scared, nervous, and uncomfortable with her attorney.” (at 1274). In upholding the administrative decision, the court held: “Neither lack of attorney preparation nor lack of a translator at Rivera’s 1997 hearing prevented the IJ from considering Rivera’s prior testimony at the 2004 hearing because the basis of the remand did not call into question the reliability of Rivera’s testimony or the reliability of the transcript.” (at 1275). Hence, “[t]hese inconsistencies, particularly when viewed cumulatively, deprive her claim of the requisite ring of truth. *Kaur v. Gonzales*, 418 F.3d 1061, 1067 (9th Cir. 2005).” (at 1275). (internal quotation marks omitted).

Due Process/IJ Bias, Not Found, Philippines (2007). The court found no due process violation in the IJ’s statement that the respondent, “has used every means of staying in the U.S. during the past eight years. The court has no greater reason to believe her today than it had to believe her when she testified in 1997.” (at 1274).

2009) (the “social visibility” standard “makes no sense”); *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) (a denial was reversed because the petitioners had been found to be members of a PSG, “family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses”); *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (a reformed former member of a Salvadoran gang had his denial reversed based on “his membership in a PSG consisting of former MS gang members”); *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010) (“holding that former members of the ‘18th Street gang’ in Honduras constituted a PSG for asylum purposes”).

Voluntary Departure/Delay. In discussing the time to be provided for voluntary departure, the court comments: “The ability to delay finality over an issue such as voluntary departure illustrates an institutional failing in these asylum cases. By petitioning the Ninth Circuit for review, an undocumented alien greatly expands an illegitimate stay in the U.S. The Ninth Circuit is failing to undertake “appropriate analysis” in terms of whether to grant a stay of removal. (at 1278). “Whether borne out of the perceived efficiency of such summary grants [stays of removal] or out of compassion for the petitioners, the policy may be at least partly responsible for the enormous backlog of immigration cases in our circuit.” (at 1278).

- ✓ *Valderrama v. INS*, 260 F.3d 1083 (9th Cir. 2001) (b) (6); upholding adverse credibility determination; petition denied; PREGERSON, FERNANDEZ, and GRABER; (PREGERSON, concurring and dissenting in part, agreed with the adverse credibility finding but urged staying the mandate to allow BIA to fully consider a motion to reopen based on marriage to a USC).

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, Philippines (2001). Alien’s first and second petitions for asylum differed in a material way, and discrepancy went to heart of alien’s claim that she was persecuted on account of her political opinion. The first application indicated she had never been a member of a political group, whereas her second application stated she had been a member of an anti-Communist group.

- ✓ *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001) (b) (6); upholding denial of asylum based on internal relocation and lack of a nexus between persecution and imputed political opinion; petition denied; GRABER; (PREGERSON, dissenting, found that the IJ’s “multiple, sua sponte objections to [alien]’s counsel’s open-ended questions as ‘leading; and his sustaining similar objections from the INS attorney effectively frustrated [alien]’s ability ‘to present directly, or fully detail, her account supporting her claim for asylum.’”).

Nexus/Motive Not Found, Pre REAL ID, Philippines (2001); Persecution/Generalized Violence, Philippines (2001). Although applicant’s father held position as Municipal Counselor, there was no evidence that guerillas knew who her father was at time of rape, and applicant testified that guerillas raped others as well and that attack might have been random act of violence.

Evidence/Testimony, Exclusion Of, Philippines (2001). IJ did not err in directing Filipino asylum applicant, who claimed that Marxist guerillas raped her because her father held office of Municipal Counselor, not to answer leading question as to whether any mention of her father occurred during rape, inasmuch as she had several opportunities to testify about what rapists said and to explain why she believed that rape was on account of imputed political opinion.

Past Persecution/Internal Relocation Possible, Philippines (2001); Well-Founded Fear/Continued Applicant Presence, Philippines (2001). Substantial evidence supported finding that Filipino applicant was not entitled to asylum because she and her children moved from small town to Manila after she was raped by Marxist guerillas, and that they lived there without incident for nearly a year before applicant came to United States.

Political Opinion/Imputed, Not Found, Philippines (2001). “The only evidence of imputed political opinion in this case is the statement, from Felicitas’ application, that ‘my family was viewed as being reactionary in the Marxist eyes of the Communist guerrillas.’ Accepting that statement as true, there remains an insurmountable difficulty for Petitioners: There is no evidence to suggest that the rapists knew who Felicitas was—much less that they knew who her father was—at the time they raped her and her daughter. The uncontroverted evidence is that: (1) Felicitas never had seen the rapists before the attack; (2) the rapists did not identify her by name; (3) the rapists did not mention her father or any other member of her family or refer to politics, even obliquely, before, during, or after the rape; (3) the rapists were not from her town; (4) the rape took place outdoors, on the way back from the market, rather than in a place (like Petitioners’ home or place of work) that would suggest that the rapists were seeking Felicitas and her daughter specifically; (5) the rapists routinely came down from the mountains at dusk and ‘harass[ed] people,’ and rapes by guerrillas happened to ‘a lot of people’; and (6) the guerrillas did not continue to harass Felicitas after the rape, or communicate with her in any way, so as to suggest that this was a purposeful attack with a political motive, rather than a despicable act of unmotivated violence against a stranger.” (at 865–66).

Nexus/Motive Not Found, Pre REAL ID, Philippines (2001). “Whether or not the guerrillas in the New People’s Army believed, as a general matter, that the family of a Municipal Counselor was reactionary, the fact remains that there is nothing in this record even to hint that the rapists knew, at the time of the rape, that Felicitas and her daughter were members of that reactionary family. By contrast, in cases in which this court has found that rapes occurred ‘on account of’ an imputed political opinion, the evidence was clear that the rapists (1) knew the specific identity of their victims; and (2) imputed political opinions to those victims. For example, in *Lopez-Galarza*, the victim’s neighbor accused her of ‘supporting the counter- revolutionary contras’; as a result, she was arrested, imprisoned, and raped. 99 F.3d at 957. In *Lazo-Majano v. INS*, 813 F.2d 1432, 1433 (9th Cir. 1987), overruled on other grounds by *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc), the victim worked for the rapist, ‘who had known her since childhood,’ and the rapist stated during the rape that the attack was on account of the political activities of the victim’s husband.” (at 866).

Persecution/Rape, Philippines (2001); Generalized Violence, Philippines (2001). “As our previous cases illustrate, in order to impute a political opinion to his victim on account of her family’s activities, a rapist necessarily must have some idea who the victim is. That crucial fact—which is a logical predicate to Felicitas’ entire claim—is not established anywhere in this record, including her application.” (at 866).

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- ✓ *Pondoc Hernaez v. INS*, 244 F.3d 752 (9th Cir. 2001) ((b) (6)); upholding denials of motion to remand and motion to reopen, finding the evidence presented was available at the time of the prior proceedings; petition denied; PAEZ; *declined to extend by Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. 2004).

Motion to Reopen/No New Evidence. Alien was not entitled to reopen removal proceeding for consideration of his application for asylum and withholding of deportation since the documentation he presented was the same evidence he used in support of his earlier motion to remand and there was no reason he could not have raised his asylum claim at the time of his initial hearing or at the time of the motion to remand. “Since at least 1990, two years before the

present deportation proceedings were instituted, it has been clear that the petitioner's sexual orientation can form the basis of an asylum claim." (at 758 (citing *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 820-23 (BIA 1990))).

✕ ***Not Affirmed***

- ✕ ***Vitug v. Holder*, 723 F.3d 1056 (9th Cir. 2013)**; Reversing a denial of withholding of removal. Respondent is gay. He reported a series of events, including having been raped and being beaten and robbed five times. The IJ found past persecution and granted withholding of removal and protection under the Convention Against Torture. The Government appealed and the Board reversed. The Circuit upheld the Board's decision to deny relief under CAT. PREGERSON.

Particular Social Group/Homosexuals, Philippines (2013). "[H]omosexuals are a 'particular social group,' and therefore that homosexuality is a protected ground." 723 F.3d at 1064 (citing *Karouni v. Gonzales*, 399 F.3d 1163, 1171-72 (9th Cir.2005)).

Persecution/Failure to Report to Authorities. The Board had reversed, in part, on the basis that Respondent had failed to report the physical violence he experienced to the police. The Circuit disagreed with this finding. As in *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006), another gay case where a denial of relief was reversed, "reporting the attacks would have been futile or have subjected him to further abuse, thereby demonstrating that the government was unwilling to control the attackers." 723 F.3d at 1065.

Persecution/Economic, Not Affirmed, Philippines (2013). "Vitug was unable to find a job in the Philippines because of his sexual orientation. Thus, Vitug also faced the 'deprivation of . . . employment,' . . . has found to be another form of persecution." *Id.* (citing *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007)).

CAT/More Likely Than Not, Not Found, Philippines (2013). "It is not clear that Vitug's beatings and economic deprivation rise to the level of torture." *Id.* at 1066 (citing *Ahmed v. Keisler*, 504 F.3d 1183, 1200-01 (9th Cir. 2007) (granting withholding of removal, but upholding the denial of relief under CAT)).

- ✕ ***Silaya v. Mukasey*, 524 F.3d 1066 (9th Cir. 2008)** (b) (6); reversing and remanding a claim based on asserted persecution at the hands of the New People's Army. The respondent claimed mistreatment from the events of 1982. The respondent had come to the U.S. in 1985. The IJ found her incredible. The IJ further found that even if the misconduct had occurred, it was not sufficiently linked to a protected ground and that the respondent could be reasonably expected to relocate to a different area. The Board found her credible, but otherwise sustained the denial. TROTT.

Persecution/Rape, Philippines (2008); Political Opinion/Found, Philippines (2008); Nexus/Motive Found, Pre REAL ID, Philippines (2008). In reversing the administrative denial, the court cited to *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004): "[E]vidence that the alleged persecutor acted because of a petitioner's family's political associations is sufficient to satisfy

the motive requirement.” (at 1070-71). The court distinguished *Ochave v. I.N.S.*, 254 F.3d 859, 862 (9th Cir. 2001). There, the court denied relief. “[W]e concluded that there was no evidence that the rapists knew who petitioner and her daughter were, let alone who petitioner’s father was.” (at 1071). Here, the “NPA members knew who she was, knew who he father was, and made comments indicating that Rosalina was chosen as a victim because of her father’s ties to the Philippine” government (at 1072).

- ✱ *Marcos v. Gonzales*, 410 F.3d 1112 (9th Cir. 2005) ((b) (6)); general and specific death threats from NPA against Civilian Home Defense Forces volunteer radio operator made his fear of persecution reasonable, even though there was no attempt to act on the threats and the threats decreased over time; upholding IJ’s finding of no past persecution, but reversing adverse credibility ruling and finding a well-founded fear of future persecution; remanding for asylum, withholding and CAT eligibility determinations; PAEZ; (GRABER, dissenting, found that past fraud provided legitimate basis to require corroborating evidence).

Credibility/False Statements. The Ninth Circuit has “drawn a clear distinction between ‘false statements made to establish the critical elements of the asylum claim [and] false statements made to evade [immigration] officials.’... the underlying motive is not determinative.” (at 1117, citing *Akinmade v. INS*, 196 F.3d 951, 956 (9th Cir. 1999)). “In *Turcios*, we noted that ‘[u]ntrue statements by themselves are not reason for refusal of refugee status and it is the examiner’s responsibility to evaluate such statements in the light of all the circumstances of the case.’” (at 1118, citing *Turcios v. INS*, 821 F.2d 1396, 1400 (9th Cir. 1987)). “[F]ear cannot be a requirement,” and alien’s “inadvertent failure to disclose [the death of the petitioning relative in the consular interview] therefore has little bearing on his credibility,” (at 1117), even though alien had an affirmative duty to disclose the death of his petitioning relative.

Persecution/Threats, Unfulfilled, Not Affirmed, Philippines (2005). That threats are unfulfilled does not render the fear unreasonable. “‘What matters is whether the group making the threat has the will or ability to carry it out.’ *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) (cited in *Kaiser [v. Ashcroft]*, 390 F.3d 653, 658–59 (9th Cir. 2004)). The NPA had both the will and the ability here. See *Briones v. INS*, 175 F.3d 727, 729 (9th Cir. 1999) (en banc).” (at 1119).

Past Persecution/Individualized Analysis, Philippines (2005). “[W]hile other excerpts of the Country Report cite changing conditions and decreasing NPA power, the IJ did not make any individualized determination whether the changed conditions reported in the Country Report will affect [the alien]’s specific situation... An ‘individualized analysis’ is *required* in this circuit...” (at 1121, citing *Borja v. INS*, 175 F.3d 732, 738 (9th Cir. 1999) (en banc), and *Garrovillas v. INS*, 156 F.3d 1010, 1017 (9th Cir. 1998)).

- ✱ *Deloso v. Ashcroft*, 393 F.3d 858 (9th Cir. 2005) ((b) (6)); reversing denial of asylum and withholding upon finding persecution on account of political opinion; remanding for a grant of withholding and discretionary grant of asylum; FISHER; *amending and superceding* 378 F.3d 907 (9th Cir. 2004) *on denial of reh’g*.

Nexus/Motive Found, Pre REAL ID, Philippines (2005). Persecution was motivated at least in part by alien's political opinions, where attacks on him began after he spoke in support of his father's run for town councilor in opposition to Communist party, likely instigator was hit man for Communist party, and hammer-and-sickle emblems were left at sites of some attacks indicating that Communist party was accepting responsibility.

Evidence/Authentication, Inability To, Not Affirmed. "We recognize that document fraud from Filipino asylum applicants is 'common.' State Department, 1997 Profile of Asylum Claims and Country Conditions for the Philippines ('To support [their] claims applicants sometimes submit statements from police or government officials asserting they are unable to protect claimants, and advising them to leave the Philippines. Venality and document fraud are common and adjudicators should exercise care in evaluating the authenticity of such evidence.'). We nonetheless accept these documents as authentic in the absence of any finding to the contrary by the IJ." (at 865, n.3).

- * *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655 (9th Cir. 2003) ^{(b) (6)}; remanding upon finding IJ made no adverse credibility finding and alien was not given notice that his credibility was at issue before the BIA; WARDLAW; (TROT, dissenting, found sufficient notice within IJ's decision that alien's testimony was not sufficiently plausible).

Credibility - Pre-REAL ID/Articulable Basis, Not Affirmed, Philippines (2003). Although court accords substantial deference to an IJ's credibility finding, court will do so only if the IJ has made an express credibility finding and has offered a specific, cogent reason for any stated disbelief; IJ must not only articulate the basis for a negative credibility finding, but those reasons must be substantial and bear a legitimate nexus to the finding.

Credibility - Pre-REAL ID/Explicit Finding Required, Philippines (2003). When IJ makes implicit credibility observations in passing, that does not constitute a credibility finding. "Here, the IJ neither found Petitioner credible nor remained completely silent as to his credibility. Instead, as in *Aguilera-Cota v. INS*, 914 F.2d at 1381, the IJ found Manimbao's testimony alone insufficient to establish his burden of proof for his asylum claim, presumably because it found him less than credible. However, as we have previously held, credibility findings must be supported by specific, cogent reasons that are substantial and bear a legitimate nexus to the determination that the petitioner did not meet his burden of establishing eligibility for asylum and deportation. See *Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001); *Osorio v. INS*, 99 F.3d 928, 931 (9th Cir. 1996). Minor inconsistencies in the record that do not relate to the basis of an applicant's alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant's fear for his safety are insufficient to support an adverse credibility finding. See *Chebchoub*, 257 F.3d at 1043; *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000); see also *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997) ("Generally, minor inconsistencies and minor omissions relating to unimportant facts will not support an adverse credibility finding."). Therefore, a credibility observation made in passing does not constitute a credibility finding sufficient for review under the standards we have developed." (at 660).

Credibility - Pre-REAL ID/Inconsistencies, Minor, Not Affirmed, Philippines (2003). Minor inconsistencies in the record that do not relate to the basis of an asylum applicant's alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant's fear for his safety are insufficient to support an adverse credibility finding.

- ✱ *Mejia v. Ashcroft*, 298 F.3d 873 (9th Cir. 2002); reversing BIA's denial of motion to reopen and remanding upon finding alien was prima facie eligible for asylum; BERZON.

Motion to Reopen/Changed Circumstances, Not Affirmed, Philippines (2002). Alien was prima facie eligible for asylum, where his unchallenged testimony demonstrated that he appeared on New People's Army (NPA) hit list in the Philippines after he had acted as informer against NPA. "Taking a shell-game like approach, the BIA neither considered whether Mejia had a well-founded fear of persecution on account of imputed opinion nor considered the new evidence regarding the broad scope and unlikely containment of the NPA threat." (at 879).

- ✱ *Agbuya v. INS*, 241 F.3d 1224 (9th Cir. 2001) ((b) (6)); reversing BIA's finding of no past persecution, remanding for a grant of withholding and discretionary grant of asylum; B.FLETCHER; (HALL, dissenting: "The majority opinion in this case stretches the meaning of political persecution to cover those aliens who are persecuted on purely economic grounds. Because I believe that only congress has the authority to re-write our immigration laws in this manner, I dissent."); amending 219 F.3d 962 on denial of reh'g.

Persecution/Kidnaping. Asylum applicant established politically motivated past persecution that gave rise to presumption of well-founded fear of future persecution, in view of evidence that applicant, who had taken actions as employee of mine that were perceived as anti-labor, was kidnaped and threatened based on her perceived support for the government and her perceived opposition to communist guerilla group.

Political Opinion/Imputed, Found, Philippines (2001). Where communist guerilla group in alien's home country viewed alien as an enemy of the communist cause, alien need not identify herself in this way to qualify for political asylum. "The dissent argues that Agbuya's persecution amounted to 'economically-motivated persecution.' Dissent at 3052. The dissent stresses that Agbuya did not make any political statements or consciously side with anyone in the struggle. As discussed above, such purported silence and neutrality does not decide the matter. Instead, we must look at how she was viewed in the eyes of the persecutors. Here, the guerilla NPA viewed Agbuya as an enemy of the miners, the NPA, and the communist cause. Agbuya need not identify herself in this way to qualify for political asylum. She was abducted, falsely imprisoned for a week, hit, threatened with a gun, and told she would be tried in a kangaroo court because of a political opinion imputed to her by her persecutors. All of this happened after she left her job, indicating that the NPA was after Agbuya for what they perceived to be her political views. She was not, as the dissent indicates, persecuted because she was rich or middle class. Instead, she was persecuted, like so many refugees who seek safe haven in the United States, because she was identified as an opponent of communism. The BIA erred because its determination was not supported by reasonable, substantial, and probative evidence on the record considered as a whole. Agbuya is entitled to political refugee status." (at 1230).

- ✱ *Lim v. INS*, 224 F.3d 929 (9th Cir. 2000) ((b) (6)); remanding for a discretionary grant of asylum; (1) petitioner sufficiently raised issues on appeal; (2) persecution risked by

applicant was on account of imputed political opinion; (3) applicant's fear of future persecution was reasonable; (4) finding that threats against applicant did not constitute past persecution was supported by substantial evidence; and (5) applicant was not entitled to withholding of deportation, even though he was eligible for asylum; Respondent was never "confronted or physically harmed." (at 935). He was "an active opponent of a political group." *GOODWIN*; distinguished by *Ruano v. Ashcroft*, 301 F.3d 1155 (9th Cir. 2002).

Persecution/Threats Alone, Not Affirmed, Philippines (2000); Threats, Unfulfilled, Not Affirmed, Philippines (2000). "Threats themselves are sometimes hollow and, while uniformly unpleasant, often do not effect significant actual suffering or harm. Furthermore, claims of threats are hard to disprove. A finding of past persecution raises a regulatory presumption of future persecution and flips the burden of proof to the INS to show that conditions have changed to such a degree that the inference is invalid. See *Surinder Singh v. Ilchert*, 69 F.3d 375, 379 (9th Cir. 1995). Flipping the burden of proof every time an asylum applicant claimed that he had been threatened would unduly handcuff the INS." (at 936). "Threats standing alone ... constitute past persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual 'suffering or harm.'" (at 936).

Withholding of Removal/Denied, Philippines (2000). The court recognizes the significantly different evidentiary standards between asylum and withholding. See also *Barraza-Rivera v. INS*, 913 F.2d 1443 (9th Cir. 1990). "To require that asylum and withholding of deportation must always walk together would be to render the distinction between the two standards mere empty words." (at 938). See also *Gui v. Ashcroft*, 280 F.3d 1217 (9th Cir. 2002) (Alien found to have established past persecution, but a denial of withholding was upheld).

Nexus/Retribution, On Account of Protected Ground, Philippines (2000). Persecution risked by alien in form of retaliation by New People's Army (NPA) in Philippines against him for testifying against NPA leaders was on account of imputed political opinion, not merely on account of personal revenge, inasmuch as threats were "revenge plus," that is, revenge partly motivated by, and thus on account of, imputed adverse political opinion.

Well-Founded Fear/Objectively Reasonable, Found, Philippines (2000). Alien's fear of future persecution by members of NPA in Philippines resulting from his testimony against NPA leaders was reasonable; although applicant was not confronted or physically harmed, he was followed, he appeared on death list, and his colleagues who received similar threats were killed. Alien's exit from government police force in Philippines did not render his fear of future persecution arising from his testimony against leaders of NPA unreasonable; fact that he was followed and continued to receive threats after retirement confirmed that NPA did not forgive him when he retired.

Well-Founded Fear/Continued Applicant Presence, Philippines (2000). Alien's failure to leave Philippines for six years after he received his first death threat from NPA did not render his fear of future persecution unreasonable; according to alien, his fear was not induced merely when he was first threatened but when his colleagues who had received similar threats were murdered and when he was followed.

Well-Founded Fear/Continued Family Presence, Philippines (2000). Fact that asylum applicant's family remained safely in Philippines after he was threatened by NPA for testifying against NPA leaders did not render his fear of future persecution unreasonable; nothing in

record supported inference that family's safety ensured that applicant would be safe, and his colleagues were killed despite lack of indication that their families were harmed.

Past Persecution/Failure to Rebut, Philippines (2000). Evidence that NPA had weakened somewhat in Philippines did not render asylum applicant's fear of future persecution resulting from his testimony against NPA leaders unreasonable; NPA remained capable of killing its opponents. "In the context of the case before us, substantial evidence supports the BIA's finding that the threats here did not constitute past persecution, but better fit 'within that category of past experience more properly viewed as indicative of the danger of future persecution.' *Boykov*, 109 F.3d at 416. Neither Lim nor his family was ever touched, robbed, imprisoned, forcibly recruited, detained, interrogated, trespassed upon, or even closely confronted. That Lim carried on for six years without harm and without fleeing provides additional support for the BIA's finding that the threats here did not inflict sufficient 'suffering or harm' to compel a finding of past persecution. The threats to Lim were precisely that – threats of future harm." (at 936).

- ✱ *Colmenar v. INS*, 210 F.3d 967 (9th Cir. 2000) (b) (6)); remanding for a new hearing based on finding alien was prevented from presenting his claims in full; *HAWKINS*; distinguished by *Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000).

Due Process/Full and Fair Hearing; IJ Bias, Found. Filipino asylum applicant was denied full and fair hearing and reasonable opportunity to present evidence on his behalf, and thus was denied due process if prejudiced thereby, when IJ indicated at start of hearing that he had already judged claim, behaved as partisan adjudicator seeking to intimidate applicant and his counsel, refused to let applicant testify about who he believed had thrown Molotov cocktail at him despite circumstantial evidence linking incident to threatening letter allegedly from revolutionary group, and refused to let applicant testify about anything that was included in his written application. "We do not enjoy second-guessing the way Immigration Judges run their courtrooms. But when a petitioner has so clearly been denied a full and fair hearing, we have no choice. Judges do little to impress the world that this country is the last best hope for freedom by displaying the hard hand and closed mind of the forces asylum seekers are fleeing. Better that we hear these claims out fully and fairly and then make an informed judgment on the merits. This is consistent with our role as judges, and the values of our Constitution demand no less." (at 973).⁵⁴

Evidence/Testimony, Exclusion Of, Philippines (2000). Although alien's conclusory assertions by themselves were insufficient to support asylum claim, he stated in brief that if he had been allowed to testify he would have established that New People's Army (NPA) was motivated in attacking him by his political opinion.

- ✱ *Grava v. INS*, 205 F.3d 1177 (9th Cir. 2000); reversing BIA's finding of no nexus between political opinion and feared persecution; remanding to determine whether fear was well-founded; (1) BIA could not refuse to consider written asylum application based on lack of stipulation that alien's oral testimony would be consistent with his written application,

⁵⁴ In *Abulashvili v. AG*, 663 F.3d 197 (3d Cir. 2011) an adverse credibility determination and denial of asylum were reversed when the court found that the IJ violated "due process" when she "took over the cross-examination at the hearing after determining that the government was not adequately prepared."

and (2) alien's failure to concomitantly espouse political theory while whistleblowing against allegedly corrupt government officials did not preclude finding that his whistleblowing was on account of political opinion; THOMAS.

Political Opinion/Whistleblowing, Philippines (2000). Although whistleblowing against one's supervisors at work is not, as a matter of law, always an exercise of political opinion for purposes of an asylum application, where the whistle blows against corrupt government officials, it may constitute political activity sufficient to form the basis of persecution on account of political opinion. In determination whether asylum applicant's persecution for whistleblowing against allegedly corrupt government officials was on account of political opinion for purposes of asylum application, the salient question was whether whistleblowing was directed toward governing institution, or only against individuals whose corruption was aberrational.

Nexus/Retribution, On Account of Protected Ground, Philippines (2000). Fact that Filipino law enforcement officer failed to concomitantly espouse political theory while whistleblowing against allegedly corrupt government officials did not compel finding that his persecution was matter of personal retaliation rather than on account of political opinion for purposes of asylum application.

Nexus/Mixed Motive, Pre REAL ID, Philippines (2000). When the alleged corruption that is the subject of an alien's whistleblowing is inextricably intertwined with governmental operation, the exposure and prosecution of such an abuse of public trust is necessarily on account of political activity for purposes of an asylum application. Although retaliation against a whistleblower by a government official completely untethered to a governmental system does not afford a basis for asylum, many persecutors have mixed motives, and, in such instances, personal retaliation against a vocal political opponent does not render the opposition any less political, or the opponent any less deserving of asylum.

Evidence/Stipulation by Parties. The Board was reversed when it held that it could "disregard Grava's written application...and to require a stipulation by the parties that his oral testimony would be consistent with his written assertions. ... [A]n applicant need not testify on his own behalf ... and may rest on the application alone." (at 1180). The court rejected *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989), as being able to justify a different result. Other supportive case law includes: *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001) ("The IJ must consider evidence contained in [the] application for asylum. Testimony is not required; an applicant may rest on [his or] her application, if [he or] she swears at the hearing that the contents of the application are true."); *Zahedi v. INS*, 222 F.3d 1157, 1166 (9th Cir. 2000) ("The objective component of the claim is complete, even without Zahedi's testimony."); *Agbuya v. INS*, 241 F.3d 1224 (9th Cir. 2001) (The case can be made on the basis of "documents or testimony."); *Kaur v. INS*, 237 F.3d 1098 (9th Cir. 2000) (The asylum seeker does not have to testify for a successful claim, as the Board was reversed upon finding that she had given up her right to asylum by "failing to testify.")

- * *Tarubac v. INS*, 182 F.3d 1114 (9th Cir. 1999) ((b) (6)); reversing BIA's denial of asylum and remanding for a discretionary grant of asylum; (1) alien's persecution was on account of her political opinion, and (2) country conditions had not changed sufficiently to render alien's fear of persecution no longer well-founded; B.FLETCHER.

Persecution/Kidnaping; Physical Harm, Not Affirmed, Physical Harm (1999). Citizen of the Philippines suffered “persecution” within meaning of statute providing for asylum based on well-founded fear of persecution, when she was kidnaped, beaten, held for a period of days, and threatened with more violence by revolutionary group.

Nexus/Mixed Motive, Pre REAL ID, Philippines (1999). Alien’s persecution by New People’s Army (NPA) revolutionary group in the Philippines was at least in part because of her political opinion, even though NPA began recruiting her and demanding that she pay “revolutionary tax” before they knew her political views, where it was not until she told NPA of her opposition to communism that NPA operatives threatened her life, kidnaped her, beat her, held her without food, and pursued her to distant city.

Finding that persecution of alien was motivated by nonpolitical factors is largely irrelevant to an alien’s eligibility for asylum, unless BIA finds substantial evidence that the only motivation for the persecution was nonpolitical.

Past Persecution/Changed Conditions Not Found, Philippines (1999); Country Reports/To Rebut Past Persecution, Insufficient, Philippines (1999). Profile issued by Department of State in 1995 was insufficient to establish that conditions in Philippines had changed so much since alien’s persecution during the years 1986 through 1991 by New People’s Army that her fear of persecution on account of her political beliefs was no longer well-founded, rendering her ineligible for asylum; although report stated there were “fewer” politically-related killings, it stated that NPA remained active and continued to engage in politically-related violence.

✱ *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (b) (6); reversing *Matter of T-M-B-*, 21 I&N Dec. 779 (BIA 1997); finding past persecution on account of political opinion; presumption was not rebutted; remanding for a discretionary grant; TROTT; (O’SANNLAIN and KLEINFELD, dissenting, argue the majority’s review was de novo and not a correct application of the “compelled” test); distinguished by *Sebastian-Sebastian v. INS*, 195 F.3d 504 (9th Cir. 1999); *Kozulin v. INS*, 218 F.3d 1112 (9th Cir. 2000); viewed by REAL ID Act of 2005 Conference Committee as having “substantially undermined a proper analysis of mixed motive cases.” H.R. CONF. REP. NO. 109-72, at 163 (2005).

Nexus/Mixed Motive, Pre REAL ID, Philippines (1999). Alien was subjected to persecution by anti-government faction in the Philippines, at least in part on account of her political opinion, and was thus eligible for asylum in view of evidence that alien articulated her political opposition to faction representatives as reason for her refusal to join; faction’s demands for money did not render persecution nonpolitical.

Past Persecution/Changed Conditions Not Found, Philippines (1999); Country Reports/To Rebut Past Persecution, Insufficient, Philippines (1999). State department profile of the Philippines was insufficient evidence of changed conditions and thus did not rebut presumption of future persecution that arose when alien established that she suffered from past persecution by anti-government faction in the Philippines on account of her political opinion; although profile suggested that faction had decreased presence, it did not negate alien’s reason to fear death if she returned to the Philippines.

Withholding of Deportation/Granted, Philippines (1999). Alien established a clear probability of persecution which entitled her to mandatory withholding of deportation, or “nonrefoulement,” as it was more likely than not that alien would be subject to persecution by

anti-government faction in the Philippines on account of her political beliefs, in view of evidence that faction told alien she would die if she did not pay specified amount of money and evidence that faction's promises were not idle.

- * *Briones v. INS*, 175 F.3d 727 (9th Cir. 1999) (en banc) (b) (6); remanding for BIA to rule on IJ's adverse credibility determination; TROTT; (O'SCANLAIN, dissenting, found that even if alien's testimony was credible, it failed to establish persecution on account of political opinion, and the petition should be denied rather than remanded); *declined to extend by Lim v. INS*, 224 F.3d 929 (9th Cir. 2000); viewed by REAL ID Act of 2005 Conference Committee as having "substantially undermined a proper analysis of mixed motive cases." H.R. CONF. REP. NO. 109-72, at 163 (2005).

Political Opinion/Found, Philippines (1999). Alleged death threats against alien by New People's Army (NPA) in the Philippines were on account of alien's political beliefs, where alien allegedly provided government with information leading to NPA's defeat in field, deaths of their combatants, and capture of one of their leaders, and record contained no reason why NPA would want to eliminate alien other than those alleged actions.

Civil Strife/Claims Arising in Context Of, Philippines (1999). Despite the personal origins of a dispute, death threats by people on one side of a civil war against a person suspected of being on the other side constitutes persecution on account of political opinion for purposes of asylum claim.

- * *Garrovillas v. INS*, 156 F.3d 1010 (9th Cir. 1998) (b) (6); vacating denial of asylum and remanding for credibility determination and discretionary grant of asylum; (1) BIA's finding that alien was not credible was not supported by substantial evidence; (2) if credible, alien's testimony apparently established that he suffered past persecution in the Philippines on account of political opinion; and (3) to rebut presumption of well-founded fear of future persecution, government would have to make individualized showing of how changed conditions in the Philippines would affect alien's situation; REINHARDT; *not followed as dicta by Lim v. INS*, 224 F.3d 929 (9th Cir. 2000).

Credibility - Pre-REAL ID/Articulable Basis, Not Affirmed, Philippines (1998). Finding of BIA that asylum applicant was not credible was not supported by substantial evidence, as applicant's inconsistent statements regarding whether he had been shot at likely stemmed from desire to tell the truth and correct earlier false statement for which applicant had explanation, BIA failed to specify examples of applicant's allegedly repeated refusals to answer questions directed to him at deportation hearing, and IJ acted with open, persistent hostility towards applicant.

Past Persecution/Credible Testimony Sufficient. If credible, testimony of asylum applicant at deportation hearing apparently established that applicant suffered past persecution in the Philippines on account of political opinion, such that applicant was entitled to presumption of well-founded fear of future persecution, based on evidence that applicant served as informant for Philippine army and that applicant received death threats due to his involvement with army.

Romania

Chronology

- ✖ *Cosa v. Mukasey*, 543 F.3d 1066 (9th Cir. 2008)
- ✖ *Circu v. Gonzales*, 450 F.3d 990 (9th Cir. 2006) (en banc)
- ✓ *Dinu v. Ashcroft*, 372 F.3d 1041 (9th Cir. 2004)
- ✖ *Gui v. Ashcroft*, 280 F.3d 1217 (9th Cir. 2002)
- ✓ *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001)
- ✓ *Marcu v. INS*, 147 F.3d 1078 (9th Cir. 1998)

✓ *Affirmed*

- ✓ *Dinu v. Ashcroft*, 372 F.3d 1041 (9th Cir. 2004) (b) (6); upholding denial of asylum based on alien's failure to demonstrate prosecution was persecution on account of political opinion; After the fall of the communist government, alien was "beaten [, leaving a scar on his face,] and threatened with death" during a police interrogation. After his release, he was "rearrested and interrogated...nearly every month," which he asserted was based on an imputed political opinion. (at 1043–44). His testimony was accepted as credible; KOZINSKI; (THOMAS, dissenting, found sufficient evidence to support the presumption that the police investigation was in fact persecution on account of political opinion).⁵⁵

Nexus/Motive Not Found, Pre REAL ID, Romania (2004). Neither the heavy-handed and drawn-out nature of Romanian police officer's investigation of alien who had served in the military under deposed communist regime for his possible involvement in shooting of civilians, nor the fact that alien credibly testified regarding his innocence from any participation in shootings, was sufficient to give rise to presumption that this investigation was mere pretext to persecute alien on account of his imputed political opinion, where alien failed to otherwise demonstrate that this investigation served no bona fide purpose.

Persecution/Prosecution, Affirmed, Romania (2004). "We certainly have never held that if police don't charge someone with a crime this will automatically raise a presumption of political persecution. The presumption arises only 'where there appears to be no other logical reason for the persecution at issue.' *Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000) (citing *Sangha v. INS*, 103 F.3d 1482, 1490 (9th Cir. 1997))...The length of time an investigation is ongoing does not alone raise a presumption of political persecution, though protracted delay can certainly be taken into account. Nor is any other factor conclusive. The question is whether petitioner has borne his burden of showing that the purported criminal investigation had no bona fide objective, so that political persecution must have been the real reason for it." (at 1044). "[B]eing

⁵⁵ The Board construed this decision in *Matter of M-A-S-*, 24 I&N Dec. 762, 764 (BIA 2009). In upholding the denial of asylum to an individual who had expressed fear of returning to Qatar because the FBI "suggested that he has ties to terrorist groups," the Board noted that "investigation of terrorism is not harm perpetrated on account of a protected ground."

innocent provides no immunity from police investigation any more than being guilty justifies unsavory police tactics... So long as the police are trying to find evidence of criminal activity, neither the length of the investigation, nor the fact that they are pursuing suspects we believe to be innocent, nor the unsavoriness of their tactics, gives rise to an inference of political persecution." (at 1045).

- ✓ *Andriiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (*en banc reh'g of* 223 F.3d 1111 (9th Cir. 2001)) (b) (6); finding IIRIRA did not strip the court of its power to issue a stay of removal, the court nevertheless found petitioner had not established eligibility; HAWKINS; (BEEZER, concurring, argues that the statutory standard should be applied rather than the court-created *Abassi* standard).

Nexus/Motive Not Found, Pre REAL ID, Romania (2001). Evidence of a single 1991 attack by figures tenuously connected to the government, without evidence that the current Romanian government or its officials desire to do him harm, is insufficient to demonstrate a probability of success on the merits under *Abassi v. INS*, 143 F.3d 513 (9th Cir. 1998).

- ✓ *Marcu v. INS*, 147 F.3d 1078 (9th Cir. 1998) (cert denied, 526 U.S. 1087 (1999)) (b) (6); (1) finding that conditions in Romania had changed to such an extent that, even if alien was persecuted in past, he no longer had well-founded fear of being persecuted if he returned was sufficiently supported by evidence, and (2) determination of BIA not to grant asylum for humanitarian reasons alone, based on past persecution that applicant had allegedly suffered because of his mother's American citizenship, was not abuse of discretion; petition denied; WALLACE; (HAWKINS, dissenting, accuses the majority of omitting facts and downplaying many of the significant events in alien's life, which demonstrate past persecution); *distinguished by Vongsakdy v. INS*, 171 F.3d 1203 (9th Cir. 1999).

Past Persecution/Changed Conditions Found, Romania (1998); Country Reports/To Rebut Past Persecution, Sufficient, Romania (1998). Finding that conditions in Romania had changed to such an extent that, even if alien was persecuted in past, he no longer had well-founded fear of being persecuted if he returned was sufficiently supported by country report prepared by Department of State and by analysis of conditions in Romania by one of the Department's directors, so as to prevent court of Appeals from disturbing determination of BIA that alien was ineligible for asylum based on any such well-founded fear of persecution.

Past Persecution/Humanitarian Asylum, Denied. Determination of BIA not to grant asylum for humanitarian reasons alone, based on past persecution that Romanian national had allegedly suffered because of his mother's American citizenship, was not abuse of discretion, given the level of persecution alleged, which consisted of denial of educational opportunities, police interrogations and beatings, and frequent searches of his home.

✖ Not Affirmed

- ✖ *Cosa v. Mukasey*, 543 F.3d 1066 (9th Cir. 2008); reversing and remanding a claim based on religious persecution. Respondent claimed that she had been “harassed, beaten, and raped by Romanian police for practicing her Millenist faith.” Denial was based on adverse credibility determination.

Credibility/Demeanor; IJ Speculation, Not Affirmed, Romania (2008). The court emphasized that the adverse credibility determination had been based on “speculation.” The IJ’s demeanor observations in terms of how the respondent dressed and “emote[d]” were rejected. “Non-evidence based on assumptions cannot support an adverse credibility determination without some evidence in the records, other than the IJ’s bare personal view, we have no way of knowing whether the IJs speculations are simply conjecture or legitimate concerns bearing on an applicant’s credibility” (citing *Lin v. Gonzales*, 434 F.3d 1158, 1163 (9th Cir. 2006)).

Credibility/IJ Personal Knowledge. The IJ relied on the minimal and inaccurate understanding demonstrated by the respondent as to her religion. The court rejected such and cited with approval to holdings from other circuits. “An IJ’s personal beliefs or some perceived common knowledge about the religion are not a proper basis for an adverse credibility determination. *Jiang v. Gonzales*, 485 F.3d 992, 995 (7th Cir. 2007). “People can identify with a certain religion, notwithstanding their lack of detailed knowledge about the religion’s doctrinal tenets and those same people can be persecuted because of their religious affiliation.” *Rizal v. Gonzales*, 442 F.3d 84, 90 (2nd Cir. 2006). “We have cautioned IJs against using an applicant’s ignorance of religious doctrine as evidence that an individual is not a true believer.” *Jiang v. Gonzales*.

- ✖ *Circu v. Gonzales*, 450 F.3d 990 (9th Cir. 2006) (en banc) (b) (6); reversing and remanding the previous panel decision, 389 F.3d 938 (9th Cir. 2004), which had upheld the denial of relief; The panel decision had permitted the IJ’s to take administrative notice of a Department of State Country Report that had been issued nineteen months after the asylum hearing to prove changed country conditions and defeat the claim of past persecution. En banc, the court held the IJ’s reliance on the report improper because the report had not been presented to the respondent prior to its use. This report was found to have material differences from the report on record; CALLAHAN.

Due Process/Notice of Evidence Considered. “[D]ue process requires notice and an opportunity to respond before the IJ renders her decision.”

- ✖ *Gui v. Ashcroft*, 280 F.3d 1217 (9th Cir. 2002) (b) (6); reversing IJ’s adverse credibility determination; presumption of future persecution was not rebutted; alien failed to satisfy more stringent eligibility requirements for withholding; remanding for a discretionary grant of asylum; B.FLETCHER.

Credibility - Pre-REAL ID/Articulable Basis, Not Affirmed, Romania (2002). IJ failed to provide a legitimate articulable basis for determination that alien’s testimony that his family’s

telephone had been tapped in his native Romania for over 15 years was not credible; while IJ found it doubtful that someone who knew his telephone was tapped would discuss “incriminating” things, such a finding was tantamount to a belief that alien should have refrained from using telephone at all, and alien claimed only that interrogations by police led him to believe that they were eavesdropping, not that he had discussed incriminating matters. Reasons offered by IJ, including disbelief of alien’s claims regarding tapping of his telephone, alleged intentional hit-and-run crashes in which he was targeted, and fact that allegedly repressive Romanian government had allowed alien to live, were insubstantial and did not bear a legitimate nexus to finding.

Evidence/Rejection by IJ. Fact that only letters offered in support of alien’s application for grant of asylum arrived shortly before his hearing on application did not provide an articulable basis for believing that alien had fabricated the letters, as would potentially support adverse credibility determination, where letters were just two items in over 130 pages of supporting documents, and alien was never questioned about dates of letters or whether they were the only ones he ever received.

Persecution/Harassment, Romania (2002). Alien’s testimony was sufficient to establish that he had suffered past persecution in his native Romania, and thus to give rise to a rebuttable presumption of a well-founded fear of future persecution which would allow alien to be deemed a refugee eligible for grant of asylum; while some of ills alien had suffered, such as searches, interrogations, and phone taps, could be construed as threats and harassment rather than an actual infliction of suffering or harm, staged hit-and-run crashes in which he was targeted victim put him at serious risk of injury or death.

Past Persecution/Failure to Rebut, Romania (2002); Changed Conditions Not Found, Romania (2002). Government failed to present evidence of changed conditions in alien’s native Romania sufficient to rebut well-founded fear of persecution on part of alien that was created by evidence of his past persecution, and thus, alien qualified as a refugee eligible for grant of asylum; BIA simply made conclusory statement that conditions had changed, and only report pointed to by INS, which was seven years old, stated that police continued to use excessive force and beat detainees.

Withholding of Deportation/ Denied, Romania (2002). Alien could not demonstrate a clear probability that his persecution would resume were he deported to his native Romania, as required to obtain withholding of deportation, in light of long passage of time and indications that Romania’s political terrain could be different than it was when alien left over ten years earlier.

Russia

Chronology

- ✖ *Doe v. Holder*, 736 F.3d 871 (9th Cir. 2013)
- ✖ *Bondarenko v. Holder*, 733 F.3d 899 (9th Cir. 2013)
- ✓ *Pechenkov v. Holder*, 705 F.3d 444 (9th Cir. 2012)
- ✖ *Smolniakova v. Gonzales*, 422 F.3d 1037 (9th Cir. 2005)
- ✖ *Krotova v. Gonzales*, 416 F.3d 1080 (9th Cir. 2005)
- ✖ *Zolotukhin v. Gonzales*, 417 F.3d 1073 (9th Cir. 2005)
- ✖ *Gonzales v. Tchoukhrova*, 127 S. Ct. 57 (2006)
- ✖ *Chouchkov v. INS*, 220 F.3d 1077 (9th Cir. 2000)
- ✓ *Kozulin v. INS*, 218 F.3d 1112 (9th Cir. 2000)
- ✖ *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000)
- ✓ *Bolshakov v. INS*, 133 F.3d 1279 (9th Cir. 1998)
- ✖ *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997)

✓ Affirmed

- ✓ *Pechenkov v. Holder*, 705 F.3d 444 (9th Cir. 2012) ((b) (6)); affirming a denial of relief as a matter of law. Respondent had been previously granted asylum. He was then convicted of felony assault with a deadly weapon or force likely to produce great bodily injury. He was given a suspended sentence of three years and apparently credited with service of 248 days in jail. His conviction was found to be a particularly serious crime within the meaning of 8 U.S.C. § 1231(b)(3)(B)(ii)/INA § 241(b)(3)(B)(ii) and the IJ revoked his asylee status, because he was now statutorily ineligible for asylum or withholding of removal. The court found that it did not have jurisdiction to review the administrative determination; GRABER.

Asylum Application/Termination of Asylee Status. The decision makes no reference to of any claim under CAT, which has no statutory bars to eligibility. The decision also makes no mention of *Nijjar v. Holder*, 689 F.3d 1077 (9th Cir. 2012) (see entry in India). There, as in the case at bar, Respondent had his asylee status terminated by DHS. The Circuit held that DHS was without authority to terminate his status. In that case, it was because there was a finding of fraud. The fact that this Respondent had been convicted of an aggravated felony conceivably might be found to be a distinguishing factor.

- ✓ *Kozulin v. INS*, 218 F.3d 1112 (9th Cir. 2000) ((b) (6)); upholding denial of asylum based on a lack of past persecution and lack of a well-founded fear; petition denied; Alien, along with other sailors, accused their captain of corruption. While the others were fired, alien was not because his skills were needed. Alien was directed to remove his signature

from the letter making the corruption charge. When he refused to do so, he was beaten by unknown individuals who did not say anything to him; GOODWIN.

Nexus/Motive Not Found, Pre REAL ID, Russia (2000). Alien had failed to show that incident in which he was attacked while working on Russian merchant marine ship was in fact motivated by his purported anti-Communist views. "That an attack occurred three weeks after a refusal to join a political party does not compel a finding of asylum eligibility if substantial evidence provides another independent apolitical motivation for the attack; the law of asylum does not require the 'logical fallacy of post hoc, ergo propter hoc' (literally, 'after this, therefore because of this'). *Huskey v. San Jose*, 204 F.3d 893, 899 (9th Cir. 2000); cf. *Hardt v. Heidweyer*, 152 U.S. 547, 558 (1894) ('Post hoc, propter hoc, is not, however, sufficient, and the rule of causation implies some other sequence than that of time. '); cf. *Sangha*, 103 F.3d at 1487 ('Applicants can no longer establish that their persecution was on account of political opinion by inference....')." (at 1117).

Well-Founded Fear/Objectively Reasonable, Not Found, Russia (2000). Mere fact that alien had applied for asylum, did not establish a well-founded fear of persecution on account of his political opinion if he were to return to Russia, even though alien's escape from Russia and application for asylum constituted treason under Russian law.

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- ✓ *Bolshakov v. INS*, 133 F.3d 1279 (9th Cir. 1998) (b) (6); (1) letters from alien's mother constituted neither prima facie case for asylum nor evidence of new circumstances which would allow reopening; (2) regulation allowing alien additional motions to reopen if agreed upon by all parties was not administrative remedy that was required to be exhausted; and (3) alien's potential eligibility for change in status based on recent certification as gifted artist was not sufficient basis for ordering BIA to remand case; petition denied; BRUNETTI; distinguished by *Jahed v. INS*, 356 F.3d 991 (9th Cir. 2004).

Motion to Reopen/No New Evidence. Letters from alien's mother, indicating that the same persons who had harassed alien while demanding money from him were still looking for him and intended to kill him if he returned to Russia, and that his ex-boss was in the hospital and one of his friends had been found dead, constituted neither prima facie case for asylum nor evidence of new circumstances arising since original hearings which would allow reopening of case.

✕ *Not Affirmed*

- ✕ *Doe v. Holder*, 736 F.3d 871 (9th Cir. 2013) (b) (6); reversing and remanding a denial of relief. The respondent is gay. Past persecution, at the hands of "nongovernmental forces," had been found. Relief had been denied on the basis that: (1) the respondent had "failed to carry his burden of demonstrating that the Russian government was unable or unwilling to control his nongovernmental persecutors"; and (2) he could reasonably have been expected to relocate to a different area. Respondent had

been badly assaulted and threatened. In Moscow, respondent had lawfully resided but reported acts of harassment but no physical violence. ALARCON.

Particular Social Group/Homosexuals, Russia (2013). The court reiterated its position: “Homosexuals are a ‘particular social group’ and therefore homosexuality is a protected ground.” 736 F.3d at 877 (citing *Vitug v. Holder*, 723 F.3d 1056, 1064 (9th Cir. 2013)).

Nexus/Nongovernmental Actor, Russia (2013). The court expanded on *Afriyi v. Holder*, 613 F.3d 924 (9th Cir. 2010): “Where a nongovernmental actor is the source of persecution, an applicant must present evidence (1) that the nongovernmental actor persecuted the applicant on account of a protected ground, and (2) that the government is unable or unwilling to control that nongovernmental actor.” 736 F.3d at 878. There need not be a “direct nexus between the government’s inability or unwillingness to control nongovernmental persecutors and a statutorily-protected ground. . . . It does not matter that financial considerations may account for such an inability to stop elements of ethnic persecution.” *Id.* (citing *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 (9th Cir. 2000)). In terms of the reasonableness of the police response to the claim for assistance, the court discussed its case law, including *Truong v. Holder*, 613 F.3d 938, 941 (9th Cir. 2010), and *Nahroani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir. 2005) (denying governmental persecution claims from Italy and Germany), *but see Mashiri v. Ashcroft*, 383 F.3d 1112, 1115 (9th Cir. 2004) (granting relief to a claim arising from Germany). The court found that the Russian police response was inadequate to justify a denial of relief.

Past Persecution/Internal Relocation Not Possible, Russia (2013). The court reversed the finding that the respondent could have reasonably continued to live in Moscow. “[I]t is not enough for the government to establish “that applicants could escape persecution by relocating internally.” 736 F.3d at 879 (citing *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003)). “Instead, it also ‘must be reasonable to expect them to do so.’” *Id.* The factors to be considered are listed at 8 C.F.R. § 1208.13(b)(3). The court cited to *Boer-Sadano v. Gonzales*, 418 F.3d 1082, 1090-91 (9th Cir. 2005), and *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214 (9th Cir. 2004), as other examples where it did not find such to be “reasonable.”

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- * *Bondarenko v. Holder*, 733 F.3d 899 (9th Cir. 2013) ((b) (6)); reversing and remanding a denial of relief. Bondarenko claimed he was arrested and beaten by the Russian police and later hit in the head so severely as to require hospitalization, because of his political activism against the war in Chechnya. Relief was primarily denied for incredibility based largely on a forensic report which was produced at the hearing, which concluded “that a medical document . . . in support of his hospitalization was fraudulent.” *Id.* at 902. The submitted medical report had not been authenticated, other than by his “own testimony.” *Id.* at 907. Alternatively, relief was denied on the basis of failure to demonstrate past persecution. FLETCHER.

Evidence/Hearsay, Cannot Rely On, Russia (2013). The court restated its “central concern” from *Cinapian v. Holder*, 567 F.3d 1067 (9th Cir. 2009) of “the right to cross-examination” so as to “test the strength and establish the scope of an expert witness’s factual determinations.” 733 F.3d at 907. Further, there is a “due process right” for an alien to have “a reasonable opportunity to examine the evidence” and such was not provided. It was no justification to assert that the respondent had not “authenticated” the report he relied upon as provided by 8

C.F.R. § 287.6, in that this simply is not mandatory under *Vatyan v. Mukasey*, 508 F.3d 1179 (9th Cir. 2007).

Past Persecution/Found, Russia (2013). The administrative process had found that even if respondent was credible, he had not demonstrated severe enough mistreatment to establish past persecution. The court found that the mistreatment had exceeded that which respondent had presented and accordingly found persecution. The court also distinguished *Gu v. Holder*, 454 F.3d 1014 (9th Cir. 2006), by noting that “Gu was detained by the police on [only] one occasion for three days and was struck on the back with a rod approximately ten times.” 733 F.3d at 910.

✱ *Smolniakova v. Gonzales*, 422 F.3d 1037 (9th Cir. 2005) (b) (6); remanding denials of asylum, withholding of removal, and finding that a marriage had been entered into to obtain an immigration benefit. The alien was of “Jewish identity.” She testified as to a pattern of significant harassment, threats, and physical mistreatment. The alien had voluntarily returned to Russia three times for periods of up to three months after leaving. NELSON.

Credibility - Pre-REAL ID/Inconsistencies, Minor, Not Affirmed, Russia (2005); Omissions, Not Affirmed, Russia (2005). The adverse credibility finding was reversed. The court restated the principle that: “The inconsistencies that an IJ adduces to establish a lack of credibility must...be specific and concrete” and “must go to the heart of the asylum claim,” citing *Singh v. Ashcroft*, 301 F.3d 1109, 1111 (9th Cir. 2002). The court also restated the principle from *Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996), that, “An applicant’s testimony is not per se lacking in credibility simply because it sets forth details that are not set forth in the asylum application.” The court criticized the IJ for using information casting into doubt the bona fides of the marriage to support the adverse credibility finding in the adjustment case.

Pro Se Applicant/Read Charitably. “Asylum forms filled out by people who are not able to retain counsel should be read charitably, especially when it comes to the absence of a comprehensive and thorough account of all past incidents of persecution.”

Unable or Unwilling to Control/Private Agent, Russia (2005). “Asylum is not restricted to petitioners who had suffered persecution at the hands of state actors,” citing *Kratova v. Gonzales*, 416 F.3d 1080 (9th Cir. 2005). “The Russian government was unwilling or unable to control the anti-Semitic groups responsible for Jewish Petitioner’s mistreatment.”

Persecution/Threats Alone, Not Affirmed, Russia (2005). “Repeated death threats, especially when those threats occurred in conjunction with other forms of abuse, require a finding of past persecution.” *Mamaijian v. Ashcroft*, 390 F.3d 1129 (9th Cir. 2004), or *Navas v. INS*, 217 F.3d 646, 648 (9th Cir. 2000). “We have consistently held that death threats alone can constitute persecution.” Additionally, “Even if a single incident does not rise to the level of persecution, the cumulative effect [can].”

Past Persecution/Changed Conditions Not Found, Russia (2005). The court reversed the finding that even if there had been past persecution, the claim could still be denied on the basis of changed country conditions in that there were still ongoing problems associated with this type of claim in Russia.

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- ✱ *Krotova v. Gonzales*, 416 F.3d 1080 (9th Cir. 2005) (b) (6)); finding past persecution. A Jewish woman reported various acts of harassment, discrimination, physical violence, and threats over a period of time. GRABER.

Persecution/Cumulative Effect, Russia (2005). The court extended its holding in *Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998) and emphasized that the assessment of past persecution is based on the “cumulative effect.” It further noted “her inability to practice her religion is significant.”

- ✱ *Zolotukhin v. Gonzales*, 417 F.3d 1073 (9th Cir. 2005) (b) (6)); A Pentecostal was denied relief and had her denial remanded due to due process concerns pertaining to the IJ precluding the presentation of evidence and having “prejudged” the case; GOULD.

Evidence/Testimony, Telephonic. It was error to not allow telephonic testimony from alien’s expert “because the testimony would have covered issues not in the written materials and reflected directly on petitioner’s credibility on points which the IJ expressed skepticism.”

- ✱ *Gonzales v. Tchoukhrova*, 127 S. Ct. 57 (2006), *vacating and remanding* 404 F.3d 1181 (9th Cir. 2005) (b) (6)); “[D]isabled children and their parents constitute a statutorily protected group” (at 1184); granting withholding of removal and remanding for a determination on asylum; REINHARDT.

Supreme Court Remand. The Supreme Court vacated and remanded the case back to the Ninth Circuit in order to allow the BIA the opportunity consider the issues in this first instance. Although vacated, the panel decision remains persuasive authority indicating the Ninth Circuit’s likely position when the issue again comes before it.

Refugee Law/Intent Of; Derivative Claims/Asylum In the original panel decision, the court stated: “Immigration law has always had a purpose of protecting families and, where possible, keeping them united. *See, e.g., Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005) (“The INA was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members.”) (at 1190–91). The court then went on to recognize a basis where the parents can obtain relief as the child’s derivatives when the child was the one who experienced direct persecution. This differs from the usual situation where the parents provide the basis for the child’s attainment of relief as the result of the misconduct directed at the parents. ***Compare to *Wang v. Gonzales*, 405 F.3d 134 (3d Cir. 2005) (in Chinese family planning case, child applicant for asylum could not stand in the shoes of parents who sustained the direct abuse).

- ✱ *Chouchkov v. INS*, 220 F.3d 1077 (9th Cir. 2000) (b) (6)); reversing denial of asylum and remanding to determine if the presumption of future persecution has been rebutted; SHADUR.

Persecution/Harassment, Russia (2000). Alien who had been victim of harassment after he failed to approve sale of nuclear materials and technology to Iran in his position as a nuclear

engineer, had been made subject to past persecution by reason of his actual or imputed political beliefs, as would qualify him as a refugee eligible for grant of asylum; numerous incidents of harassment, including theft of vehicle and automobile accident, had occurred in span of two and one-half months and thus could not be viewed as coincidence, numerous other incidents, including threatening phone calls and following of applicant, were not chance misfortune, and applicant's employer was an arm of Russian government.

Credibility - Pre-REAL ID/IJ Speculation, Not Affirmed, Russia (2000). "It must be stressed that what sounds peculiar in one country may be the norm in another. Consequently, non-evidence-based assumptions about conduct in the context of other cultures must be closely scrutinized." (at 1083, n.15).

Nexus/Coincidence. Although one incident may be "discounted as mere coincidence, surely all of them cannot. It is like multiplying fractions: If for example a 50-50 chance exists that a single incident is purely accidental, those odds become exponentially greater with the occurrence of each ensuing incident. And when the other more than-suspicious surrounding circumstances reviewed hereafter are factored into the calculation, making the likelihood of sheer chance of each incident a long shot, the odds resulting from multiplying those much smaller fractions tend to become extraordinarily high." (at 1083).

- * *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000) ((b) (6)); reversing BIA's denial of relief and remanding for a grant of withholding and a discretionary grant of asylum; SHADUR; (WARDLAW, dissenting, chided the majority for holding there is a pattern and practice of Armenian harassment in Russia and that such harassment amounts to persecution).

Persecution/Harassment, Russia (2000); Economic, Not Affirmed, Russia (2000); Ethnicity/Not Affirmed, Russia (2000). Alleged incident in which ethnic Armenian was harassed and pushed by Russian officers because of her ethnicity, her alleged inability to get job even though she had diploma because "there were no jobs for Armenians," and alleged rape and beating by police officials of her friend's daughter, who was Armenian, did not amount to past persecution creating rebuttable presumption of objective fear of future persecution for purposes of asylum claim.

Well-Founded Fear/Subjectively Genuine. Russian citizen of Armenian ethnicity met subjective component of test for well-founded fear of future persecution, for purposes of asylum claim; IJ stated after listening to her testimony that she demonstrated high degree of fear and emotion.

Well-Founded Fear/Objectively Reasonable, Found, Russia (2000); Pattern or Practice, Not Affirmed, Russia (2000); Ethnicity/Not Affirmed, Russia (2000). Russian citizen of Armenian ethnicity met objective component of test for well-founded fear of future persecution, for purposes of asylum claim, based on her individual experiences of harassment and fact that Russian government was unable or unwilling to stop pattern or practice of harassment of Armenians, notwithstanding fact that Russia's army rescued citizen and other Armenians from Azerbaijan, fact that her husband received pension from Russian government, or fact that she received Russian passport and used it to come to United States to assist her ill sister.

Unable or Unwilling to Control/Financial Resources of Gov't. That Russian government's financial considerations might account for any inability on its part to stop ethnic persecution of

persons of Armenian ethnicity was irrelevant to whether asylum applicant established objective element of well-founded fear of persecution; what mattered instead was whether Russian government was unwilling or unable to control those elements of its society committing the acts of persecution.

Persecution/Detention, Not Affirmed, Russia (2000); Physical Harm, Not Affirmed, Russia (2000). Detention, intimidation, and beatings of Armenians in Russia because of their ethnicity constituted “persecution” for purposes of applicant’s claim for asylum, inasmuch as it involved infliction of suffering or harm upon those who differed in race, religion, or political opinion in a way regarded as offensive.

- ✱ *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) ((b) (6)); Russian lesbian suffered mistreatment because of her sexual orientation pursuant to laws that applied generally to the entire population; reversing and remanding based on BIA’s error in requiring alien to establish that her persecutor was motivated by desire to punish or inflict harm; B.FLETCHER.

Persecution/Definition Of. “We have defined ‘persecution’ as ‘the infliction of suffering or harm upon those who differ ... in a way regarded as offensive.’ *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (citing *Sagermark [v. INS]*, 767 F.2d 645, 649 (9th Cir. 1985)). This definition of persecution is objective, in that it turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem ‘offensive.’ That the persecutor inflicts the suffering or harm in an attempt to elicit information, as in *Nasseri v. Moschorak*, 34 F.3d 723, 724–25 (9th Cir. 1994), for his own sadistic pleasure, as in *Lopez-Galarza [v. INS]*, 99 F.3d 954 (9th Cir. 1996)], to ‘cure’ his victim, or to ‘save his soul’ is irrelevant. Persecution by any other name remains persecution.” (at 647).

Senegal

Chronology

- ✖ *Bassene v. Holder*, 737 F.3d 530 (9th Cir. 2013)
- ✖ *Fakhry v. Mukasey*, 524 F.3d 1057 (9th Cir. 2008)
- ✖ *Ndom v. Ashcroft*, 384 F.3d 743 (9th Cir. 2004)

✓ *Affirmed*

✖ *Not Affirmed*

- ✖ *Bassene v. Holder*, 737 F.3d 530 (9th Cir. 2013) (b) (6); reversing and remanding a denial of asylum and related relief. Relief had been denied on the basis of a finding that Respondent was not credible. This is a pre-REAL ID Act case. Respondent had initially filed an N-400, when he should have filed an I-589. In the N-400, he provided only a “low level of detail” as to the basis of his claim for protection, which was “his Diola ethnicity and his affiliation with the armed wing of the Movement of the Democratic Forces of the Casamance,” a political organization. *Id.* at 532. He did not mention his membership in the organization or the fact that he had been arrested and detained for two or three days on his N-400.

Credibility - Pre-REAL ID/Inconsistencies, Material, Not Affirmed, Senegal (2013). An alien completing an N-400 is asked to list, under oath, any arrests or organizational memberships. When Respondent was asked why he did not do so, he responded: “I don’t know.” Later, Respondent filed out an I-589, which contained information that was apparently consistent. The N-400 that he erroneously completed was considered “akin to early-stage asylum proceedings like bond hearings, airport interviews, and asylum interviews,” in terms of the weight it could be accorded. *Id.* at 537.

Credibility - Pre-REAL ID/IJ Speculation, Not Affirmed, Senegal (2013). The adverse credibility finding was reversed as “speculation,” notwithstanding the IJ’s reference that as “an educated person, he should have known to mention his arrest and detention by the Senegalese military in his mistakenly filed N-400 citizenship application.” *Id.* at 536. ““Omissions [in I-589 asylum applications] are not given much significance because applicants usually do not speak English and are not represented by counsel.” *Id.* at 537 (quoting *Kin v. Holder*, 595 F.3d 1050, 1056 (9th Cir.2010)).

Bars to Asylum/One Year Bar, Not Found, Senegal (2013). The one year bar was not applied because the N-400 was filed “less than six months after his J-1 visa expired.” *Id.* at 535. Under these circumstances, the N-400 was deemed a timely “quasi-asylum application.” *Id.*

- ✱ *Fakhry v. Mukasey*, 524 F.3d 1057 (9th Cir. 2008) (b) (6)); reversing and remanding a denial of relief. Relief had been denied on the bases that the respondent had not timely filed the I-589 and that he could reasonably relocate to a different part of the country. BERZON.

Bars to Asylum/One Year Bar, Not Found, Senegal (2008). The respondent testified that he came to the U.S. with the subjective intent to file for asylum but did not do so timely. The court found that notwithstanding the respondent having experienced particular problems prior to his entry that there were sufficient “changed circumstances” to justify the delay given ongoing, significant human rights abuses and particular information that might put him at risk. Hence, “[f]or the first time since his arrival in the U.S., Fakhry had an objectively reasonable basis to believe that” he had a viable claim. 524 F.3d at 1064. The court noted that the IJ had denied the claim on the finding that the beating he previously reported had been insufficiently linked to his asserted political viewpoint.

Past Persecution/Senegal, Internal Relocation Not Possible, Senegal (2008). “Where the persecutor is a government or is government inspired...it shall be presumed that internal relocation would not be reasonable...” 8 C.F.R. 208.13(b)(3)(ii); *Singh v. Ilchert*, 63 F.3d 1501, 1511 (9th Cir. 1995) (stating that a finding of past persecution triggers the belief that “the government has the ability to persecute the application throughout the country.”) *Accord, Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003).

Withholding of Removal/Denied, Senegal (2008). The court emphasized the significant evidentiary burden between a grant of asylum requiring only a ten percent change of risk as opposed to a grant of withholding of removal, which requires a greater than 50% chance of risk. The denial of relief on this basis was upheld.

- ✱ *Ndom v. Ashcroft*, 384 F.3d 743 (9th Cir. 2004) (b) (6)); reversing BIA’s finding of no past persecution on account of political opinion, granting withholding and remanding for a discretionary grant of asylum; BERZON.

Persecution/Threats, Not Affirmed, Senegal (2004); Detention, Not Affirmed, Senegal (2004); Arrests, Senegal (2004). Credible death threats that were made against alien by police commissioner in Senegal, especially when coupled with evidence of his detention, for 19 consecutive days, in dark, crowded cells without formal charges and with no indication of when he would be released, in shackles that prevented him from straightening his legs, and without benefit of toilet in which to urinate, rose to level of “persecution.”

Persecution/Generalized Violence, Senegal (2004). “Widespread violence and detention cannot override record evidence that persecution occurred at least in part as a result of an applicant’s protected status. . . . Where we have found no persecution despite civil strife or random violence, the reason has been the applicant’s failure to establish that his or her persecutor was motivated by one of the five statutory grounds. *See, e.g., Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (‘[Petitioners] did not establish that the attack was anything more than an act of random violence during a period of significant strife.’); *Gaya Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996) (‘A necessary element of past persecution is that the alien must show he was persecuted, because of his race, religion, nationality, membership in a particular social group, or political

opinion. It is not sufficient to show he was merely subject to the general dangers attending a civil war of domestic unrest.’ (quotation marks and citations omitted)).” (at 752–53).

Persecution/Ethnic Cleansing. “If violence has its roots in enmity based on a protected statutory ground, this state of affairs will bolster an asylum claim. An extreme example is ethnic cleansing. . . . Even in circumstances falling short of such barbarity, we are similarly more likely to find that particular instances of past persecution experienced by an applicant were inflicted on account of a protected ground where similar acts are regularly experienced by others who share the applicant’s protected affiliation. *See, e.g., Chand v. INS*, 222 F.3d 1066, 1076 (9th Cir. 2000) ([T]hat other Indian Fijians have faced persecution similar to the persecution Chand suffered strengthens, rather than weakens, his claim.’); *Kotas*, 31 F.3d at 854 ([T]he existence of persons similarly situated to [the petitioner] in some ways strengthens his claim by establishing that his case was part of a larger government tendency to detain and harass, rather than an isolated event.’).” (at 753–54).

Civil Strife/Claims Arising in Context Of, Senegal (2004). “With respect to claims of past persecution ... requiring an applicant to show that the persecution he or she suffered was ‘appreciably different from the dangers faced by ... fellow citizens,’ *Kotas*, 31 F.3d at 852 (internal quotation and citation omitted), would have a perverse effect: Petitioners whose governments inflict widespread human rights abuses on protected groups would be required to make a greater showing of past persecution than those from countries where human rights abuses are more narrowly targeted.” (at 754). “In sum, even in situations of widespread civil strife, ‘it is irrelevant whether one person, twenty persons, or a thousand persons were targeted or placed at risk,’ [*Kotas v. INS*, 31 F.3d 847, 854 (9th Cir. 1994)], so long as there is a nexus to a protected ground.” (at 754). “Evidence of physical harm is not required to establish persecution. *See Khup v. Ashcroft*, 376 F.3d 898, 903 (9th Cir. 2004); *Baballah v. Ashcroft*, 367 F.3d 1067, 1074 (9th Cir. 2004). The cumulative effect of harms that might not individually amount to persecution may support an asylum claim.” (at 751).

Serbia (& Former Yugoslavia)

Chronology

- ✓ *Kasneccovic v. Gonzales*, 400 F.3d 812 (9th Cir. 2005)
- ✗ *Hoxha v. Ashcroft*, 319 F.3d 1179 (9th Cir. 2003)

✓ *Affirmed*

- ✓ *Kasneccovic v. Gonzales*, 400 F.3d 812 (9th Cir. 2005) (b) (6); upholding IJ's adverse credibility determination and denial of asylum, withholding and CAT; petition denied; LEAVY.

Credibility - Pre-REAL ID/Inconsistencies, Material, Affirmed, Serbia (2005). Alien entered the US in 1998, and told the INS interviewer that she was born in Montenegro, Yugoslavia. In December 1999, she applied for TPS, stating she was born in Kosovo. She made other conflicting statements as well. IJ's adverse credibility finding was thus supported by substantial evidence. Alien's statements regarding her nationality and residence in her interviews, TPS application, asylum applications and testimony before the IJ were inconsistent and material, and her explanation was inadequate.

✗ *Not Affirmed*

- ✗ *Hoxha v. Ashcroft*, 319 F.3d 1179 (9th Cir. 2003) (b) (6); upholding denial of withholding to citizen of former Yugoslavia who was ethnically Albanian; reversing denial of asylum and remanding for a discretionary grant, noting that "political and social conditions in Kosovo have changed;" CANBY; distinguished by *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004).

Persecution/Harassment, Serbia (2003); Threats, Unfulfilled, Not Affirmed, Serbia (2003). Unfulfilled threats by various Serbs against applicant constituted harassment rather than persecution, the one incident of physical violence against applicant was not connected with any particular threat, and there was no evidence indicating that the incident was officially sponsored. Citing with approval, *Matter of A- -*, 23 I&N Dec. 737, 740 (BIA 2005).

Well-Founded Fear/Individualized Risk, Not Affirmed, Serbia (2003). Record provided a lengthy and grisly documentation of the numerous atrocities committed against ethnic Albanians, the threats and violence applicant experienced, although not sufficient to compel a finding of past persecution that would create a presumption in his favor, were indicative of his individualized risk of experiencing similar mistreatment if he returned to Kosovo, and fact that applicant received, and ignored, a summons for an "informative conversation" with Serbian authorities also demonstrated an individualized risk of persecution.

Withholding of Removal/Denied, Serbia (2003). Although the evidence of abuse against ethnic Albanians was extensive, and although alien demonstrated that he had an appreciably higher risk of persecution than other Albanians, the evidence did not compel a finding that it was more probable than not that he would be persecuted upon return to Kosovo.

Well-Founded Fear/Continued Family Presence, Serbia (2003). Although continued family presence in the country “ordinarily diminishes the petitioner’s risk of future persecution, *see, e.g., Lim [v. INS]*, 224 F.3d 929, 935 (9th Cir. 2000)], evidence of the condition of the applicant’s family is relevant only when the family is similarly situated to the applicant. *See id.* Hoxha has demonstrated that he is not similarly situated because he has been previously victimized by Serbian vigilantes, and because he has been summoned by the Serbian authorities.” (at 1184).

Sierra Leone

Chronology

- ✖ *Sowe v. Mukasey*, 538 F.3d 1281 (9th Cir. 2008)
- ✓ *Sillah v. Holder*, 320 F. App'x 503 (9th Cir. 2009)

✓ *Affirmed*

- ✓ *Sillah v. Holder*, 320 F. App'x 503 (9th Cir. 2009); granting a petition for reconsideration and withdrawing what had been a published decision denying relief. *See Sillah v. Mukasey*, 519 F.3d 1042 (9th Cir. 2008). The Court substituted an unpublished decision denying the petition for review.⁵⁶

✖ *Not Affirmed*

- ✖ *Sowe v. Mukasey*, 538 F.3d 1281 (9th Cir. 2008) (b) (6); remanding a denial of relief on the basis of inadequate consideration of discretionary relief for “humanitarian asylum.” The IJ had denied relief based on finding the respondent to be incredible and changed country conditions. The Board did not reach the credibility issue and dismissed the appeal on the basis of changed country conditions that had occurred in Sierra Leone. In other words, even if one was to be deemed as no longer having a well-founded fear of future persecution based on changed country conditions, “humanitarian asylum” is still available upon demonstration of past persecution and must be fully considered.” ALARCON.

Past Persecution/Changed Conditions Found, Sierra Leone (2008); Country Reports, Use Of Permitted, Sierra Leone (2008); Country Reports/To Rebut Past Persecution, Sufficient, Sierra Leone (2008). The court upheld the administrative finding that there had been sufficient evidence of sufficient changed country conditions. The court accepted reliance on the then current State Department report. *Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. 1995) was cited with approval with regard to the reports being “the most appropriate and perhaps the best resource for information on political situations in foreign nations.” This was so even with the recognition that information in the report was “somewhat contradictory” and that there had not been an “individualized analysis” of the impact of the changes as to this particular respondent.⁵⁷

⁵⁶ In *Diallo v. Mukasey*, 508 F.3d 451 (8th Cir. 2007), the circuit found changed country conditions in Sierra Leone sufficient to justify a denial of relief.

⁵⁷ In *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012), the Board, in response to a Circuit Court remand, discussed its view of 8 C.F.R. 1208.12(b)(1)(iii)(B) in the context of an individual who has been found to

Past Persecution/Humanitarian Asylum. Given the respondent's testimony as to horrific occurrences, and the fact that the Board had not considered the adverse credibility finding, the dismissal of this claim was inadequately supported.

CAT. The court upheld the denial of this claim on the basis of the changed country conditions.

have experienced past persecution, but no longer has a well-founded fear of future persecution where there has been a material change in country conditions from the time of the past persecution. The Board characterized this as "humanitarian asylum." In assessing whether the individual "may suffer 'other serious harm' upon removal" the decision discussed how such factors as "civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the claimant could experience severe mental or emotional harm or physical injury" should be considered. (at 714.) Such "may be wholly unrelated to the applicant's past harm and need not be inflicted on" the basis of a protected ground, but "the harm must be so serious that it equals the severity of persecution." (at 705.)

Somalia

Chronology

- ✖ *Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014)
- ✓ *Aden v. Holder*, 589 F.3d 1040 (9th Cir. 2009)
- ✖ *Jibril v. Gonzales*, 423 F.3d 1129 (9th Cir. 2005)
- ✖ *Ali v. Ashcroft*, 421 F.3d 795 (9th Cir. 2005)
- ✖ *Mohamed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005)
- ✖ *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2005)
- ✖ *Shire v. Ashcroft*, 388 F.3d 1288 (9th Cir. 2004)
- ✖ *Farah v. Ashcroft*, 348 F.3d 1153 (9th Cir. 2003)

✓ *Affirmed*

- ✓ *Aden v. Holder*, 589 F.3d 1040 (9th Cir. 2009) (b) (6); affirming a denial of relief. The respondent “presented himself as a Somalian from a minority clan” whose account of his life is “horrific.” The IJ raised a number of credibility “doubts” but did not make an adverse credibility finding. Nor did the Board make such a finding in its review. Applying the REAL ID Act, the court found that the decision would stand because the Respondent had not sufficiently corroborated his case. KLEINFELD.

Credibility - Post-REAL ID/Corroboration, Required, Somalia (2009). The IJ recessed and continued the hearing so that the respondent could provide corroboration, so there is no issue whether he should have been given notice of his need for corroboration and his time to provide it. The court found that the REAL ID Act “abrogated” such cases as *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000) and *Kataria v. INS*, 232 F.3d 1107 (9th Cir. 2000), which had held that “corroboration cannot be required for an applicant who testified credibly.” The circuit noted “there are three prerequisites before uncorroborated testimony may be considered sufficient:” (1) the applicant’s testimony is credible; (2) the applicant’s testimony is persuasive; and (3) the applicant’s testimony refers to facts sufficient to demonstrate refugee status. “Credible testimony is not by itself enough.” In other words, the applicant may “be turned down for failing to provide corroboration where he does have it or could reasonably obtain it.” The circuit recognized that “Congress has installed a bias in the statute toward corroboration in the statute to provide greater reliability.”

Credibility - Post-REAL ID/Corroboration, Sufficiency. In response to the IJ’s request, respondent provided three unsworn “affidavits” supporting his position. Given that the court found that “Somalia is a violently disorderly place with no established state” it might well have sufficed for Respondent to have testified that he tried to obtain supporting materials but was simply not able to succeed. Given the totality of information in the record, the circuit stated a “highly deferential standard of review” with regard to the determination that the corroboration

was insufficient. The circuit found the issue to be “close” but upheld the decision “in light of other evidence in the record casting doubt on [the respondent’s] story.”

Due Process/Translation. Respondent sought to make a due process argument with regard to the adequacy of the interpretation. The court found no prejudice to Respondent and noted that because the respondent had some ability to communicate in English, “he was not entirely reliant on the translator.”

CAT/More Likely Than Not, Not Found, Somalia (2009). The circuit denied relief because the record did not “compel” a finding that respondent would be “tortured” “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R. § 1208.18(a)(1).

✕ *Not Affirmed*

- ✕ *Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014) (en banc) (b) (6); remanding so that the BIA could determine whether the “applicant’s credible and uncontradicted testimony regarding her date of entry meets the statutory ‘clear and convincing evidence’ standard.” *Id.* at 528. Previously, the BIA had affirmed the IJ’s denial of asylum (on the basis that the application was time-barred) and remanded for updated background checks. *Id.* at 521. The BIA deemed Abdisalan’s next appeal to be an untimely motion to reconsider, dismissed it, and again remanded the matter to the IJ for updated background checks. *Id.* The IJ’s third decision reaffirmed his previous two decisions. *Id.* Abdisalan then filed petitions for review of the BIA’s dismissal of the motion to reconsider as well as the IJ’s third decision, and the Ninth Circuit consolidated the two petitions. *Id.* Because a petition for review must be filed “no[] later than 30 days after the date of the final order of removal,” the Ninth Circuit addressed what constitutes a “final order of removal.” *Id.* (quoting INA § 242(b)(1)). *WARDLAW*.

Removal Order/Finality, Somalia (2014). The Ninth Circuit held that “when the Board . . . issues a decision that denies some claims but remands any other claims for relief to an [IJ] for further proceedings (a ‘mixed’ decision), the BIA decision is not a final order of removal with regard to any of the claims, and it does not trigger the thirty-day window in which to file a petition for review.” *Id.* at 520. In other words, “in the absence of a motion to reopen or reconsider, there is only one final order of removal per alien, and that order does not become final until background checks or other remanded proceedings are complete.” *Id.* at 524 (citation omitted). In reaching this holding, the Ninth Circuit overruled *Li v. Holder*, 656 F.3d 898 (9th Cir. 2011). *Id.* at 523, 526.

- ✕ *Jibril v. Gonzales*, 423 F.3d 1129 (9th Cir. 2005) (b) (6); remand for exercise of discretion after finding the alien to be credible and having demonstrated past persecution; The claim related to a “home invasion” involving a considerable amount of physical violence against members of the family of a minority, “disfavored” clan after the fall of the government of Siad Barre in January of 1991. The IJ had found the alien not credible and found that no corroborative evidence had been offered specific to the claimed violence.

The BIA summarily affirmed the IJ's decision. The Ninth Circuit found the inconsistencies relied upon by the IJ were either not in fact present or otherwise not significant enough to pass muster under such Ninth Circuit case law as *Osorio v. INS*, 99 F.3d 928, 931 (9th Cir. 1996) and *Mendoza-Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003). O'SCANNLAIN.

Credibility/Implausibility, Not Affirmed, Somalia (2005). "An IJ must be allowed to exercise common sense in rejecting a petitioner's testimony even if the IJ cannot point to specific, contrary evidence in the record to refute it. Without such latitude, IJs would be bound to credit even the most outlandish testimony as long as it was internally consistent and not contradicted by independent evidence in the record;" citing *Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003) or *Singh-Kaur v. INS*, 183 F.3d 1147, 1152 (9th Cir. 1999). In rejecting the IJ's adverse credibility finding the Ninth Circuit held, "The IJ found it implausible that Jibril could have remained unresponsive after being kicked in the head, that Jibril could have survived a gunshot wound to the stomach overnight, and that there was a medical facility in Mogadishu during the civil war that could have performed the operation that Jibril described undergoing. In each case the IJ determined that Jibril's account was implausible without pointing to any evidence that contradicted him."

Credibility/REAL ID Standard. Stating regarding the standards set forth for evaluation of credibility at 8 U.S.C. §1158(b)(1)(B)(iii), if they "were in effect today, we would be obliged to deny Jibril's petition" and **any** inaccuracies in his statement **without regard to whether they go to the heart of the claim** would be valid bases for the IJ's adverse credibility determination (emphasis in original).

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- ✱ *Ali v. Ashcroft*, 421 F.3d 795 (9th Cir. 2005); remanding after the Supreme Court's decision in *Jama v. ICE*, 543 U.S. 335 (2005), holding that a Somali national could not be removed to Somalia because Somalia lacked a functioning government
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- ✱ *Mohamed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) ((b) (6)); remanding based on finding that forced FGM is a permanent and continuing act of persecution, giving rise to an un rebuttable presumption of a well-founded fear of future persecution; (1) Alien satisfied burden of showing that she was prejudiced by her counsel's deficient performance in immigration proceedings by failing to offer evidence that she was subjected to involuntary FGM;⁵⁸ (2) FGM performed on Somalian national qualified as "persecution," such as might support her asylum claim; and (3) FGM, like forced

⁵⁸ *Teclezghi v. Holder*, 378 F. App'x 615 (9th Cir. 2010) was an unpublished decision denying a motion to reopen filed by a woman who had FGM but had not disclosed it to any of several attorneys who had unsuccessfully represented her with regard to an asylum claim based on her religious beliefs. Her MTR had been filed nearly three years after the Board's decision. Notwithstanding the fact that "nearly 90% of women in Eritrea (her country of citizenship) experience genital mutilation," the circuit did not find ineffective assistance from the former attorneys for failing "to ask her an intensely personal question and raise a claim for relief which petitioner admittedly never mentioned to them." Thereafter a petition for rehearing en banc was filed which the circuit denied over a vigorous published dissent by PREGERSON. See *Teclezghi v. Holder*, 628 F.3d 1055 (9th Cir. 2011).

sterilization, is in nature of permanent and continuing act of persecution, that gives rise to presumption of well-founded fear of future persecution that government cannot rebut with evidence of changed country conditions or of possibility of relocating. REINHARDT.

Persecution/FGM. “[T]he extremely painful, physically invasive, psychologically damaging and permanently disfiguring process of genital mutilation undoubtedly rises to the level of persecution.” (at 796). “Furthermore, ‘[p]ersecution may be emotional or psychological, as well as physical.’ *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004).” (at 796). The fact that FGM occurred and the alien is not at further risk, does not take away the basis of the claim. (at 799, citing with approval *Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. 2005)).⁵⁹

Particular Social Group/Female Genital Mutilation. FGM is persecution on account of membership in a social group, in this case defined as either Somalian females or as young girls in the Benadiri clan, even with it being “widely-accepted and widely-practiced.” (at 796–98).

Well-Founded Fear/Permanent and Continuing Persecution. “In sum, because female genital mutilation is, like forced sterilization, a ‘permanent and continuing’ act of persecution, our precedent dictates the conclusion that the presumption of well-founded fear in such cases cannot be rebutted.” Alternative, less compelling reasons—persecution of women in Somalia is not limited to FGM, and alien engaged in extramarital sex, increasing her risk of further FGM—“present plausible explanations for why the presumption would prove dispositive in Mohamed’s case.” (at 801). ***See also *Abebe v. Ashcroft*, petition for reh’g en banc granted, 400 F.3d 690 (9th Cir. 2005) (panel held that risk of a USC daughter being subjected to FGM was too speculative and denied relief)

CAT/Torture, Found, Somalia (2005); Public Official. “[T]o the extent that Mohamed’s past genital mutilation constitutes torture, her ongoing experience may be enough to establish that she is automatically entitled, without more, to protection under CAT.” (at 802). This is so even without any suggestion of governmental involvement or encouragement.

✕ *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2005) ((b) (6)); reversing IJ’s finding of firm resettlement and no past persecution; remanding to consider presumption of future persecution; affirming IJ’s denial of CAT relief; D.W. NELSON. This was a “home invasion” case of a member of a minority Somali clan.

Nexus/Mixed Motive, Pre REAL ID, Somalia (2005); Motive Found, Pre REAL ID, Somalia (2005). Alien established she was persecuted in part on account of political opinion and for membership in clan which was low in caste system in Somalia; alien’s husband worked for political group which empowered her clan, alien was gang raped by members of militia composed of members of ruling clan, rapists declared that alien was “getting what she deserved” because of her clan status and “now we are in power” during rape, militia taunted family as being clan traitors, and at least one rapist knew of husband’s political affiliation. The

⁵⁹ In *Bah v. Mukasey*, 529 F.3d 99 (2d Cir. 2008), the Second Circuit forcefully rejected the administrative denial of relief in an FGM case where the theory was that since the procedure would not be replicated, the respondent did not have a basis for future risk. The court emphasized that prior involuntary FGM would be considered past persecution and a basis for relief. This decision as well as *Mohammed* effectively rejects *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007).

fact that these acts may have been done for the assailants “personal gratification” did not take away from the Respondent being able to meet the “on account of” requirement.

Bars to Asylum/Firm Resettlement, Not Found, Somalia (2005). Alien was not firmly resettled in Ethiopia prior to entering United States, even though alien lived and worked in Ethiopia for five years; alien never was offered permanent residence in Ethiopia and alien never had right to remain permanently in Ethiopia.

Past Persecution/Country Reports, Use Of Rejected, Somalia (2005). “We have repeatedly found that the DHS has not rebutted the presumption of a well-founded fear of persecution when evidence in country reports indicates that persecution similar to that experienced by the petitioner still exists. *See, e.g., Agbuya v. INS*, 241 F.3d 1224, 1231 (9th Cir. 2001); *Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000).” (at 789). This was so, notwithstanding the report that thousands of Somalis have returned from exile.

- ✱ *Shire v. Ashcroft*, 388 F.3d 1288 (9th Cir. 2004) ((b) (6)); reversing IJ’s adverse credibility determination and remanding for a consideration of withholding and CAT claims’ TASHIMA.

Credibility - Pre-REAL ID/IJ Speculation, Not Affirmed, Somalia (2004); Inconsistencies, Minor, Not Affirmed, Somalia (2004). IJ’s rejection as not credible of testimony of past persecution offered by alien was not supported by substantial evidence, where judge relied merely on speculation that it was unlikely that alien could, as he testified, have entered the U.S. with false passport, on minor inconsistencies in alien’s testimony not going to the heart of persecution claims, or on alien’s failure to produce corroborating evidence, including medical report from doctor in Somalia who treated his thumb after it was allegedly cut off by members of rival clan, that was not easily available to alien in the United States.

Credibility/Corroboration Not Required, Somalia (2004). “Securing verification of flight records and of entry into the United States from the NIIS is not a ‘relatively uncomplicated task,’ especially given the variety of spellings used for Shire’s actual name and assumed name, as well as the well-known problems the INS has had tracking immigrants into the United States. *Chebchoub [v. INS]*, 257 F.3d 1038, 1044–45 (9th Cir. 2001)] (internal quotation marks omitted).” (at 1298).

Evidence/Authentication, Inability To, Not Affirmed. Failure to authenticate, at least in the absence of evidence undermining their credibility, does not indicate submitted documents are anything but what they purport to be.

- ✱ *Farah v. Ashcroft*, 348 F.3d 1153 (9th Cir. 2003) ((b) (6)); upholding IJ’s adverse credibility determination and denial of asylum; reversing frivolous asylum application finding; vacating the order of permanent ineligibility for immigration benefits; SCHROEDER.

Credibility - Pre-REAL ID/Articulable Basis, Not Affirmed, Somalia (2003). IJ offered specific, cogent reasons for disbelief and found alien was not credible regarding “key elements of the asylum application, including identity, membership in a persecuted group, and date of entry in the United States. Eligibility for asylum depends on the credible establishment of these

elements. 8 U.S.C. § 1158(d)(5)(A)(i). We must defer to the IJ's credibility findings and uphold the denial of asylum relief." (at 1156).

CAT/Raised as Claim. Although under *Kamalthas v. INS*, 251 F.3d 1279, 1282–83 (9th Cir. 2001), the court rejected the BIA's determination that an applicant fails to satisfy his burden of presenting a prima facie case for CAT relief where he merely restates facts that have already been deemed incredible at a prior asylum hearing and that the standards for the two bases of relief are distinct and should not be conflated, there was also corroborative evidence the BIA failed to consider; where an applicant's claims under CAT are based on the same statements that were deemed to be not credible in the asylum context, and the alien fails to submit other evidence corroborating the likelihood of torture, the CAT claim summarily fails. (at 1156–57). *Kamalthas* is distinguished on the basis that there was in the record evidence which was not central to an asylum claim but would be to a CAT claim.

South Africa

Chronology

- ✓ *Gonzales v. Thomas*, 547 U.S. 183 (2006), *rev'g* 409 F.3d 1177 (9th Cir. 2005) (en banc)
- ✓ *Gormley v. Ashcroft*, 364 F.3d 1172 (9th Cir. 2004)

✓ *Affirmed*

- ✓ *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per CURIAM), *rev'g* 409 F.3d 1177 (9th Cir. 2005) (en banc *reh'g* of 359 F.3d 1169 (9th Cir. 2004)) (b) (6); The Supreme Court granted the government's petition for a writ of certiorari and summarily reversed the Ninth Circuit's en banc opinion. Although the respondent had claimed, inter alia, persecution on the basis of membership in a particular social group, the administrative process had not considered this claim in denying relief. The Supreme Court characterized the Ninth Circuit's opinion as having "unanimously held... a family may constitute a social group" and overruled "aberrant contrary circuit precedent." The Supreme Court held that the en banc decision erred under *INS v. Ventura*, 537 U.S. 12 (2002), in that the administrative process was not first given the opportunity to consider the issue.
- ✓ *Gormley v. Ashcroft*, 364 F.3d 1172 (9th Cir. 2004) (b) (6); (1) robberies suffered by asylum applicant did not establish past criminal persecution; (2) aliens failed to provide evidence that they suffered from past economic persecution; and (3) aliens failed to establish eligibility for asylum on the basis of a well-founded fear of economic and/or criminal persecution; petition denied; WARDLAW.

Persecution/Robbery; Random Attack, South Africa (2004). Robberies suffered by a White asylum applicant did not establish past criminal persecution where there was no showing that Black perpetrators victimized him on account of his race as opposed to their observation that he carried a cell phone and a watch; random, isolated criminal acts perpetrated by anonymous thieves do not establish persecution. "Robberies of this sort are all too common a by-product of civil unrest and economic turmoil. ... Random, isolated criminal acts perpetrated by anonymous thieves do not establish persecution. See *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000)." (at 1177).

Persecution/Economic, Affirmed, South Africa (2004); Race. Aliens who claimed that implementation of South Africa's Employment Equity Act 55 resulted in their economic persecution on account of their race by causing them to lose their longtime jobs and rendering them unable to secure new ones, failed to provide evidence that they suffered from past economic persecution; applicants suffered, at most, what could be perceived as reverse discrimination which resulted in some adverse economic consequences.

Persecution/Discrimination, Affirmed, South Africa (2004). "[Aliens] have established only that they fear (1) future racial *discrimination* with adverse economic consequences, and (2)

potential criminal attacks from random black assailants. These fears, while perhaps well-founded, do not amount to persecution.” (at 1180). “Discrimination on the basis of race or religion, as morally reprehensible as it may be, does not ordinarily amount to ‘persecution,’ ... even if it generates an adverse economic result.” (at 1178).

Civil Strife/Claims Arising in Context Of, South Africa (2004); Past Persecution/Country Reports, Use Of Permitted, South Africa (2004). The State Department’s assessment that wealth “remains highly skewed among racial lines” factors into the objective component of the claim. (at 1175, 1179). “Asylum is generally not available to victims of civil strife unless they are singled out on account of a protected ground.” (at 1177, quoting *Ochave v. INS*, 254 F.3d 859, 865 (9th Cir. 2001)).

✕ *Not Affirmed*

Sri Lanka

Chronology

- ✓ *Annachamy v. Holder*, 686 F.3d 729 (9th Cir. 2012), granting panel reh'g but denying petition for reh'g en banc, 733 F.3d 254 (9th Cir. 2013)
- ✓ *Don v. Gonzales*, 476 F.3d 738 (9th Cir. 2007)
- ✗ *Suntharalinkam v. Gonzales*, 506 F.3d 822 (9th Cir. 2007)
- ✗ *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006)
- ✗ *Thangaraja v. Gonzales*, 428 F.3d 870 (9th Cir. 2005)
- ✗ *Arulampalam v. Ashcroft*, 353 F.3d 679 (9th Cir. 2003)
- ✗ *Kankamalage v. INS*, 335 F.3d 858 (9th Cir. 2003)
- ✗ *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002)
- ✗ *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001)
- ✗ *Ratnam v. INS*, 154 F.3d 990 (9th Cir. 1998)

✓ Affirmed

- ✓ *Annachamy v. Holder*, 686 F.3d 729 (9th Cir. 2012), granting panel reh'g but denying petition for reh'g en banc, 733 F.3d 254 (9th Cir. 2013) (b) (6); affirming a denial of asylum and withholding of removal. Credibility was not at issue. Respondent reported significant physical mistreatment at the hands of the LTTE "then at war with the Sri Lankan government." Respondent was granted asylum by the IJ. DHS appealed and the Board awarded deferral of removal under CAT, but reversed the grant of asylum on the basis that respondent has provided "material support" to the LTTE. Respondent testified that he had never been a member of the LTTE and was "opposed to it." Still, he conceded having contributed \$37 to them "under duress." FISHER.

Bars to Asylum/Terrorist Bar, Affirmed, Sri Lanka (2012). Referring to *Khan v. Holder*, 584 F.3d 773 (9th Cir. 2009), the court rejected the argument, "the LTTE was engaged in 'legitimate political violence'" and found that both respondents had "engaged in terrorist activities by soliciting funds for a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). There is reference to *Matter of S-K-*, 23 I&N Dec. 936, 941 (BIA 2006): "Congress intentionally drafted the terrorist bars to relief very broadly."

Bars to Asylum/Terrorist Bar (Duress), Affirmed, Sri Lanka (2012). The fact that respondent had to engage in this activity under duress was not found to be an exception to the bar, rejecting what might be said to have been a similar argument under *Negusie v. Holder*, 555 U.S. 511 (2009), having to do with applying the persecutor bar under 8 U.S.C. § 1101(a)(42) in terms of who may be defined as a "refugee" where the court upheld an implied "duress" defense.

- ✓ *Don v. Gonzales*, 476 F.3d 738 (9th Cir. 2007) (b) (6); upholding an adverse credibility determination resulting in denial of asylum and related relief. The claim was

from a family which was not politically active. The lead respondent (father) testified that he and his family received threats from both sides in the Sri Lankan civil war because a “cook employed at the restaurant owned by Don was arrested . . . as a suspected LTTE terrorist.” “The LTTE never came to Don’s home and neither he nor his family was physically harmed.” The adverse credibility determination was based on: “inconsistency in the evidence presented regarding a crucial date, the implausibility of Don’s account, and Don’s propensity for dishonesty.” The lead respondent gave conflicting dates as to when the cook was first employed; RAWLINSON. There was a very long and impassioned dissent by WARDLAW.

Credibility - Pre-REAL ID/Propensity for Dishonesty, Affirmed. “Admission of prior dishonesty can support an adverse credibility determination.” (citing *Kaur v. Gonzales*, 418 F.3d 1061, 1064 n.1 (9th Cir. 2005)). “A statement that one’s memory is better now than it was earlier supports an inference of untruthfulness.” (citing *Kelly v. City of San José*, 114 F.R.D. 653, 667 (N.D. Cal. 1987) (recognizing that memory is fresher “closer in time to the subject events”)). When documentary evidence offered to support a claim is questionable, an adverse determination is supported.” (citing *Singh v. Ashcroft*, 367 F.3d 1139, 1143 (9th Cir. 2004) (refusing to credit documents that appeared backdated, did not show the claimed injuries, and omitted described medical treatment)). The inability to recall the date when the cook commenced employment “went to the heart of Don’s claim because it involved the very event upon which he predicated his claim for asylum.” (citing *Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001)). The court sustained the IJ’s finding in that “Don admitted lying to the Sri Lankan police and to the LTTE, because he was afraid of what would happen if he told the truth.” Among the supporting citations is *Kaur v. Gonzales*, *supra*.

Credibility/Implausibility, Affirmed, Sri Lanka (2007). The court sustained the IJ’s finding citing to *Jibril v. Gonzales*, 423 F.3d 1129, 1135 (9th Cir. 2005): “[T]estimony that is implausible in light of the background evidence can support an adverse credibility determination.”

× *Not Affirmed*

- × *Suntharalinkam v. Gonzales*, 506 F.3d 822 (9th Cir. 2007) (b) (6); A citizen of Sri Lanka reported significant mistreatment at the hands of the Sri Lankan army because he was suspected of being a terrorist associated with the LTTE. The IJ made an adverse credibility finding. This was based on eight different factors. Included was the evidence presented by a DHS investigator who asserted that the respondent was part of a group of Sri Lankans smuggled to the United States by the LTTE and that such constituted “material aid to a terrorist organization in violation of U.S. law.” After the case was presented for en banc consideration, the petitioner moved for the appeal to be dismissed on the basis that he had left the U.S. to pursue an asylum claim in Canada. The government requested both its costs and a payment for its attorney’s fees. The en banc decision vacated the panel decision, but denied these requests.

Evidence/Reliance on Investigative Report. DHS presented a report from an investigator. The court faulted reliance thereon in that the investigator did not rely on “individualized facts about” respondent as opposed to an analysis of general trends and conditions.”

- ✱ *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006); The case granted a writ of habeas corpus to a citizen of Sri Lanka who had been granted asylum on the basis of past persecution as a Tamil from government forces opposing the LTTE. He had been held in detention for nearly five years and had been denied parole on the basis of allegations that he had been involved in terrorist activities based on allegations of terrorist involvement received by the government from an anonymous source. The court held that the general detention provisions pertaining to aliens “cannot be read to authorize the indefinite detention of suspected terrorists.” THOMAS. The court awarded EAJA fees of \$156,778.68 to the respondent’s attorneys upon its finding that the government’s position in the litigation had not been substantially justified. 569 F.3d 906 (9th Cir. 2009).
- ✱ *Thangaraja v. Gonzales*, 428 F.3d 870 (9th Cir. 2005); granting EAJA fees in a Sri Lankan asylum case. An ethnic Tamil asserted that she had been detained and sustained physical mistreatment by the Sri Lankan Army because of its belief that she had been assisting the LTTE. An IJ denied the case and the Ninth Circuit remanded in an unpublished decision. The court found the agency decision not to have been “substantially justified.” BERZON.

Persecution/Prosecution, Not Affirmed, Sri Lanka (2005). Respondent has made no claim of any political activity. The IJ had denied relief, in part, on the basis that her treatment had been “for questioning on the basis of a legitimate investigation” into violent terrorist type activity. Additionally, there was the finding by the IJ: “The objective evidence indicates that there are very few instances where women are associated with the Tamil Tigers...[or] to support respondent’s claim that there even would be a question of imputed political opinion to a female youth in Sri Lanka.” The court cited its previous Sri Lankan case law of *Ratnam v. INS*, 154 F.3d 990 (9th Cir. 1998) and *Arulampalam v. Ashcroft*, 353 F.3d 679 (9th Cir. 2003), in squarely rejecting the IJ’s position.

Credibility - Pre-REAL ID/Detail, Lack Of (2005). The IJ found the respondent not credible because, while her testimony about her journey to the U.S. had great detail, other portions were much more vague. The Ninth Circuit reversed, finding the overall story to be “sufficiently descriptive.” See *Akinmade v. INS*, 196 F.3d 951, 957 (9th Cir. 1999).

- ✱ *Arulampalam v. Ashcroft*, 353 F.3d 679 (9th Cir. 2003); reversing IJ’s adverse credibility determination; remanding to a different IJ for a determination of asylum on the merits; BERZON; (FERNANDEZ, concurring with the CAT decision, but dissenting in regards to the credibility determination).

Credibility - Pre-REAL ID/Articulable Basis, Not Affirmed, Sri Lanka (2003); Corroboration Not Required, Sri Lanka (2003). It is improper for an IJ, in making credibility determinations, to make generalized statements that do not identify specific examples of evasiveness or contradiction in an asylum applicant’s testimony. It is inappropriate to base an adverse

credibility determination on an asylum applicant's inability to obtain corroborating affidavits from relatives or acquaintances living outside of the United States.

Credibility - Pre-REAL ID/Demeanor. Credibility determinations regarding demeanor must include specific reference to non-verbal communication as a basis for the decision.

- ✱ *Kankamalage v. INS*, 335 F.3d 858 (9th Cir. 2003) ((b) (6)); remanding based on finding the particularly serious crime bar to asylum eligibility does not apply retroactively; SILVERMAN.

Bars to Asylum/Particularly Serious Crime, Not Found, Sri Lanka (2003). Under regulation providing that IJ may not grant asylum to any alien who, having been convicted of particularly serious crime, constitutes a danger to community, the INS need not make separate determination of danger to community once it finds that alien's offense constitutes a particularly serious crime; however, the regulation could not be applied retroactively to alien who, at time he pled guilty to allegedly disqualifying crime, would not have been rendered ineligible for asylum under then-existing law.

- ✱ *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002) ((b) (6)); reversing adverse credibility determination and remanding for a new hearing; McKEOWN.

Credibility/Boilerplate Determinations. Boilerplate opinions neither afford asylum applicant the BIA review to which he or she is entitled, nor do they provide an adequate basis for court to conduct its review. Boilerplate adverse credibility findings, which focused on demeanor observations that were worded identically to findings in two other opinions that the judge issued in the same week, indicated that asylum applicant's case did not receive the individualized attention that it deserved; identical descriptions of the demeanor of witnesses in three different cases demonstrated IJ's predisposition to discredit the testimony, rather than any lack of credibility on the part of the witnesses.

Credibility/False Statements. Use of false documents for travel was not a proper basis for an adverse credibility determination in an asylum case.

- ✱ *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001) ((b) (6)); vacating denial of CAT based solely on asylum ineligibility and remanding; B.FLETCHER.

CAT/Raised as Claim. Inability to state a cognizable asylum claim did not necessarily preclude relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Alien testified he left Sri Lanka because Tamil Tiger rebels attempted to recruit him and then beat him for refusing to join them. As a Tamil male, he was then captured and subjected to torture by Sri Lankan police.

Country Reports/To Support Claim, Sufficient, Sri Lanka (2001). In order to present a prima facie case for relief under Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, burden of proof is on the petitioner to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal; country conditions alone can play a decisive role in granting relief under the Convention, and

relief under the Convention does not require that the prospective risk of torture be on account of certain protected grounds.

- ✱ *Ratnam v. INS*, 154 F.3d 990 (9th Cir. 1998) ((b) (6)); reversing denial of asylum and withholding; remanding for a grant of withholding and a discretionary grant of asylum; B.FLETCHER.

Credibility - Pre-REAL ID/Explicit Finding Required, Sri Lanka (1998). BIA did not err in determining that IJ did not disbelieve the material facts testified to by alien regarding asylum claim and that he should be considered a credible witness; although IJ found alien “not a totally credible witness,” BIA determined that there was no indication that IJ disbelieved material facts relevant to BIA’s legal determination.

Nexus/Mixed Motive, Pre REAL ID, Sri Lanka (1998); Motive Found, Pre REAL ID, Sri Lanka (1998). Torture of alien by Sri Lankan government officials, after he was allegedly forced by Liberation Tigers of Tamil Elam (LTTE) to transport weapons in his fishing boat, was on account of his imputed political opinions, and thus was basis for relief from exclusion and deportation, even if the torture was conducted for intelligence-gathering purposes.

Persecution/Torture, Found, Sri Lanka (1998); Prosecution, Not Affirmed, Sri Lanka (1998); Political Opinion/Found, Sri Lanka (1998). Torture in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion, provides a proper basis for asylum and withholding of deportation even if the torture served intelligence gathering purposes.

Sudan

Chronology

- ✖ *Al-Mousa v. Mukasey*, 518 F.3d 738 (9th Cir. 2008), *withdrawn*, on petition for rehearing, 545 F.3d 694 (9th Cir. 2008); unpublished disposition substituted
- ✖ *Kalouma v. Gonzales*, 512 F.3d 1073 (9th Cir. 2008), *modifying* 499 F.3d 1090 (9th Cir. 2007) *and denying any further motion for reconsideration*
- ✖ *Taha v. Ashcroft*, 389 F.3d 800 (9th Cir. 2004)

✓ *Affirmed*

✖ *Not Affirmed*

- ✖ *Al-Mousa v. Mukasey*, 518 F.3d 738 (9th Cir. 2008), *withdrawn*, on petition for rehearing, 545 F.3d 694 (9th Cir. 2008); unpublished disposition substituted.
- ✖ *Kalouma v. Gonzales*, 512 F.3d 1073 (9th Cir. 2008), *modifying* 499 F.3d 1090 (9th Cir. 2007) *and denying any further motion for reconsideration* (b) (6); reversing and remanding a denial of asylum on the basis that “if the person’s identity is undetermined, then the person would not be able to be granted asylum.” This was so even though the IJ had made an adverse credibility finding. NOONAN. There was a dissent by TALLMAN. He noted: “There is substantial fraud in immigration matters, and we should not blind ourselves to the black market in false documents.” *Kalouma v. Gonzales*, 499 F.3d 1090, 1093 (9th Cir. 2007).

Identity/Identification Standard. Notwithstanding the 1996 amendments to the INA, the court holds that asylum cannot be denied on the basis of failure to satisfactorily identify one’s self. It was sufficient for the respondent to have “identified himself in terms of his parents, birth date, birth place, tribe and religion.” *Kalouma v. Gonzales*, 499 F.3d at 1092.

Credibility/Inconsistencies, Minor, Not Affirmed, Sudan (2008). The IJ’s adverse credibility determination was reversed. The decision emphasizes the necessity for an actual inconsistency if that is to be a basis for disbelief. The IJ’s reliance on this inconsistency was not accepted: “he watched his uncle murdered in the hut” as compared to the “uncle died one week after he was beaten in the hut.” (at 1074). A second rejected example was: “Kalouma told the Border Patrol that he had come to America for an education for four years before returning to Sudan. He later applied for asylum as a refugee. The IJ treated these two positions as inconsistent establishing Kalouma’s insincerity.” (at 1075). With regard to inconsistencies between the testimony and the I-589, “anyone who has had any experience with asylum cases is aware that asylum

applications are usually slapped together with little or inexperienced legal advice and that they rarely tell the asylum seeker's whole story." (at 1075).

- ✱ *Taha v. Ashcroft*, 389 F.3d 800 (9th Cir. 2004) (on reh'g of 362 F.3d 623) (b) (6); reversing adverse credibility determination and denial of CAT; remanding for grant of CAT, withholding, and discretionary grant of asylum; An asylum seeker had withheld from the I-589 information about a rape which was central to the claim. The court, on reconsideration, reversed its decision after initially upholding an adverse credibility determination as finding at first that it was not reasonable to withhold the information notwithstanding the claim that it was painful for the applicant to have disclosed such to the preparer of the I-589; BEEZER, KOZINSKI, and SCHWARZER.

Credibility - Pre-REAL ID/Omissions, Not Affirmed, Sudan (2004). "[W]hile it is true that [alien]'s testimony offered considerably more detail than his asylum application, there is nothing inconsistent about the two accounts. We have repeatedly held that the 'failure to file an application form that was as complete as might be desired cannot, without more, properly serve as the basis for a finding of a lack of credibility.' *Aguilera-Cota v. U.S.INS*, 914 F.2d 1375, 1382 (9th Cir. 1990); see also *Akinmade v. INS*, 196 F.3d 951, 956 (9th Cir. 1999)." (at 801).

Credibility - Pre-REAL ID/Detail, Lack Of (2004). Contrary to BIA's and IJ's finding that alien's testimony lacked specificity, his "testimony concerning his torture at the hands of the Sudanese government was quite specific, oftentimes containing horrific details." (at 802).

CAT/Independent Evaluation Required. BIA must independently evaluate Convention Against Torture claims; denials based solely on adverse credibility findings with respect to asylum claims will be reversed.

Syria

Chronology

✖ *Hamoui v. Ashcroft*, 389 F.3d 821 (9th Cir. 2004)

✓ *Affirmed*

✖ *Not Affirmed*

✖ *Hamoui v. Ashcroft*, 389 F.3d 821 (9th Cir. 2004) (b) (6); reversing denial of motion to reopen based on finding applicant had presented prima facie case for CAT eligibility; remanding for a hearing on CAT relief; CANBY. The Ninth Circuit had previously upheld the denial of claims for asylum and withholding of deportation.

Ineffective Assistance/Prejudice Found. Denial of alien's motion to reopen removal proceedings, based upon allegedly ineffective assistance that he received in connection with presentation of claim for relief under CAT, was abuse of discretion; BIA, in denying alien's motion on theory that any deficiencies in counsel's performance could not have prejudiced him because he had not shown that he would be tortured if returned to his homeland, and because IJ's rejection of his asylum claim foreclosed relief under CAT, applied incorrect standard for relief under CAT and improperly equated evidence needed to sustain asylum claim with evidence needed to establish claim under CAT.

CAT/Public Official. To obtain relief, one must demonstrate a greater than fifty percent risk of torture, but it need not be by the governmental "authorities" themselves. Syrian national established prima facie case for relief under CAT, and was entitled to have removal proceedings reopened so that he could have full hearing on matter, by submitting affidavit that he believed that he would be detained and tortured based on his prior currency violation and his prior interrogations by Syrian officials, and by submitting opinions of three individuals who had expertise in human rights violations in Syria and the Middle East, all of whom opined that it was more likely than not that alien would be tortured if he were deported to Syria.

Ukraine

Chronology

- ✖ *Dzyuba v. Mukasey*, 540 F.3d 955 (9th Cir. 2008)
- ✓ *Husyeu v. Mukasey*, 528 F.3d 1172 (9th Cir. 2008)
- ✖ *Fedunyak v. Gonzales*, 477 F.3d 1126 (9th Cir. 2007)
- ✖ *Sagaydak v. Gonzales*, 405 F.3d 1035 (9th Cir. 2005)
- ✓ *Halaim v. INS*, 358 F.3d 1128 (9th Cir. 2004)
- ✓ *Nagoulko v. INS*, 333 F.3d 1012 (9th Cir. 2003)
- ✖ *Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998)

✓ Affirmed

- ✓ *Husyeu v. Mukasey*, 528 F.3d 1172 (9th Cir. 2008) (b) (6); affirming a denial of relief. “Husyeu submitted a declaration in which he described in detail several instances in which he and his immediate family members suffered verbal and physical abuse at the hands of members of Ukrainian nationalist groups” because of their ethnicity. (at 1175). The respondent’s asylum claim was denied for failure to timely file his application. His other claims were denied based on an adverse credibility determination. The court affirmed but found it had jurisdiction to review the one-year filing issue. CANBY.

Bars to Asylum/One Year Bar, Found, Ukraine (2008). The court found: “[W]e have jurisdiction under the REAL ID Act to review” the timeliness of the application. (at 1175). The application has been filed 364 days after the respondent’s legal status had expired. The court suggested in dictum that a six-month period might be considered “reasonable” and that the administrative finding of an untimely filing was correct.

Credibility - Pre-REAL ID/Omissions, Affirmed, Ukraine (2008). The court upheld the adverse credibility determination. This was over the “omission” of “Husyeu’s failure to mention in his asylum application and interview [before the asylum adjudicator] the 15 speeches that he gave in the Ukraine in the early 1990s to denounce the persecution of ethnic minorities at the hands of Ukraine ultra-nationalists.” (at 1183). The court cited with approval *Li v. Ashcroft*, 378 F.3d 959, 962 (9th Cir. 2004) and *Wang v. INS*, 352 F.3d 1250, 1257 (9th Cir. 2003) as this “omission of his political activities in his application and interview goes to the heart of his claim.” *Id.*

- ✓ *Halaim v. INS*, 358 F.3d 1128 (9th Cir. 2004) (b) (6); (1) discrimination against aliens in Ukraine, due to their religion, did not rise to level of persecution; (2) “Lautenberg Amendment” did not create presumption that aliens were eligible for asylum; petition denied; GRABER.

Persecution/Discrimination, Affirmed, Ukraine (2004); Not Rising to Level Of, Ukraine (2004). Discrimination against aliens in Ukraine, due to their religion, did not rise to level of

persecution; while aliens were victims of many derogatory comments and, over course of 50 years, a few incidents that could have been deemed police harassment, aliens were able to secure long-term employment in Ukraine, and lived relatively unmolested lives for last decade of their time there.

Well-Founded Fear/Lautenberg Amendment. “Lautenberg Amendment,” which lowered burden of proof for aliens from certain groups processed outside United States to establish eligibility for asylum, did not create presumption that two aliens in United States, from one such group, were eligible for asylum; even if Amendment was not expressly limited to claims by aliens processed outside United States, it still required each applicant to establish particularized well-founded fear of persecution, and lower standard of proof was not the same as conclusive presumption.

- ✓ *Nagoulko v. INS*, 333 F.3d 1012 (9th Cir. 2003) (b) (6); upholding denial of asylum and withholding; petition denied; GOULD.

Persecution/Definition Of; Of Family, Affirmed, Ukraine (2003); Of Friends or Affiliates, Ukraine (2003). For purposes of an asylum application, “persecution” is an extreme concept that does not include every sort of treatment our society regards as offensive. Acts of violence committed against an asylum applicant’s friends or family can establish well-founded fear of persecution.

Persecution/Physical Harm Not Necessary, Ukraine (2003). “In the precise circumstances of this case, it is significant that Nagoulko never suffered any significant physical violence. Unlike in other cases where we have held that the record compels a finding of past persecution, Nagoulko was never physically harmed. . . The recital of two occasions where Nagoulko was ‘pushed’ while attending church services interrupted by government officials does not compare to the severity of physical abuse that in other cases we have deemed persuasive to show persecution.” (at 1016).

Well-Founded Fear/Objectively Reasonable, Not Found, Ukraine (2003); Speculative. “Nagoulko testified that her greatest fear in returning to the Ukraine is that the Communist party will regain power and kill her on account of her religious beliefs. She has submitted no specific evidence to suggest that the Communist party will regain power in the Ukraine. Though changes of government are always possible in any country, on the record before us, this possibility is too speculative to be credited as a basis for fear of future persecution. This conclusion is reinforced by the January 1995 Country Report of Ukraine submitted to the IJ, which does not support the likelihood of Ukraine’s return to Communism that Nagoulko fears. While we fully accept that Nagoulko’s fear of future persecution is subjectively genuine, it is not objectively reasonable under the circumstances of this case.” (at 1018).

✕ *Not Affirmed*

- ✕ *Dzyuba v. Mukasey*, 540 F.3d 955 (9th Cir. 2008) (b) (6); reversing and remanding an order of removal to Ukraine. Respondent had come to the U.S. as a refugee on the basis of a passport by the then Soviet Union. He and his family had lived in the then Ukrainian Republic thereof prior to it becoming an independent state. The court found a

misapplication of section 1231(b)(2)(E)(i) with regard to designation of a country of removal. It was error to have designated Ukraine when there was no such country. PER CURIAM.

Country of Removal/Designation. The case was remanded with the direction that the Board answer the question as to “whether ‘country’ as used in the INA requires an independent political entity or encompasses a non-sovereign region within another sovereignty.”

- * *Fedunyak v. Gonzales*, 477 F.3d 1126 (9th Cir. 2007) (b) (6); reversing and remanding denials of asylum and withholding of removal. Respondent was a business man. A local government official demanded illicit payments. The respondent was assaulted when he refused to make them. When respondent sought the assistance of local police, he was further threatened and made payoffs to them. Respondent made complaints to various governmental officials about this corruption. He was again threatened and assaulted. There was no issue as to credibility. The administrative denial had been based on the finding that “the extortion suffered by Fedunyak was motivated by ‘personal’ rather than ‘political’ interests.” FISHER.⁶⁰

⁶⁰ In *Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011) the Board stated its point of view to applying the REAL ID Act “to an asylum claim founded on opposition to official corruption (or ‘whistleblowing’) in the context of the ‘at least one central reason’ nexus standard.” The IJ: “should consider: 1. Whether and to what extent the alien engaged in activities that could be perceived as expressions of anticorruption beliefs; 2. Any direct or circumstantial evidence that the persecutor was motivated by the alien’s actual or perceived anti-corruption beliefs and, 3. Any evidence regarding the pervasiveness of corruption within the governing regime.” The Board noted *Marku v. Ashcroft*, 380 F.3d 982, 987 (6th Cir. 2004) as an example of whistleblower who had been motivated by “nonpolitical reasons . . . she refused to doctor balance sheets because she was afraid of going to jail . . . An employee may also be motivated by personal revenge or animus . . . such activities may still form a basis for a persecutor to impute a political opinion to an alien.” *Id.* at 528-29. “An alien must persuade the trier of fact not just that the alleged persecutor was motivated in some measure by the alien’s actual or imputed political belief, but that the protected trait was ‘one central reason’ for the persecution.”

Matter of N-M-, has been limited by *Yu v. Holder*, 693 F.3d 294 (2d Cir. 2012). In that case an individual in a Chinese state run aircraft factory tried to report that his employer had corruptly refused to pay workers their due pay. In doing so, he was arrested, jailed, beaten, and fired. This case was filed under the REAL ID Act. Relief had been denied on the basis that the problem had been “aberrational” that is to say; “the respondent is directing his complaint against individuals who take advantage of their position who engaged in embezzlement and corruption”. Persecution had not been established because; this had occurred due to “greed and theft”. Hence, such did not “constitute a political challenge directed against a governing institution”. “Yu did not meet his burden because he did not establish that endemic corruption occurs [at the company] with the complicity of the State” and that the problems were “a personal dispute against his individual employers for misusing funds”. This reasoning was rejected. “Where opposition to corruption transcends self-protection and represents a challenge to state-sanctioned modes of official behavior, a petitioner may be eligible for asylum”. Further, “The fact that the protests organized by Yu challenged corruption at a single work place does not render the corruption categorically aberrational . . . Yu’s conduct is typical of political protest . . . Yu had no personal, financial motive to oppose the corruption, undertook to vindicate the rights of numerous other persons as against an institution of the state . . . and suffered retaliation by an organ of the state-the police”.

Political Opinion/Whistleblowing, Ukraine (2007). “Fedunyak’s whistleblowing was political because – in criticizing the local regime’s failure to stop the extortion scheme – his acts were directed toward a governmental institution’ and not only ‘against individuals whose corruption was aberrational.’” (Quoting *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000) and also citing *Hasan v. Ashcroft*, 380 F.3d 1114, 1120 (9th Cir. 2004) (“holding that whistleblowing was political where an alien published article criticizing not just politician's corruption but also the indifference exhibited by local law enforcement”). “Retaliation for investigating or publicizing corruption by political figures is by its very nature a political act.” *Sagaydak v. Gonzales*, 405 F.3d 1035, 1042 (9th Cir. 2005). “It was sufficient that Fedunyak demonstrated that he suffered retaliation for acting against governmental corruption.”

- ✱ *Sagaydak v. Gonzales*, 405 F.3d 1035 (9th Cir. 2005) (b)(6); reversing and remanding denial of asylum and withholding upon finding persecution was on account of an imputed political opinion; upholding denial of CAT; Alien, who worked for the Tax Inspectorate in Ukraine, uncovered an illegal tax-evasion scheme in an audit of the Hidro Corporation, which was founded by a high-ranking government official. After alien refused Hidro’s bribes, his wife was briefly abducted, he received threatening phone calls, and his cousin was shot. The court found that “[b]y adhering to the new government policies and refusing Hidro’s bribes, [alien] took a political stance in opposition to the corrupt government practices that allowed Hidro to exist.” Furthermore, because of widespread government corruption at all levels, his “refusal to accede to Hidro’s bribery, in the context of Ukrainian politics, was a political statement.” (at 1044). PAEZ; (TASHIMA, dissenting in part and concurring in part, found the majority impermissibly narrowed the plain meaning of “any determination” and ignored *Hakeem v. INS*, 273 F.3d 812, 815 (9th Cir. 2001) in assuming jurisdiction over erroneous INA § 208(a)(2) determinations); *but cf. Carrillo-Gonzalez v. INS*, 353 F.3d 1077 (9th Cir. 2003) (IJ lacks authority to equitably toll one-year deadline for diversity visa lottery program, notwithstanding a claim of being actively misled).

Political Opinion/Imputed, Found, Ukraine (2005). Alien’s status as a government employee in the Ukrainian Tax Inspectorate office was sufficient to show an imputed political opinion under *Navas v. INS*, 217 F.3d 646, 659 n. 19 (9th Cir. 2000) (finding “persecution of those who work for or with political figures to be on account of the political opinion of their employer even if the nature of their work ... is not in itself political.”), and *Aguilera Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990) (“[Alien]’s status as a government employee caused the opponents of the government to classify him as a person ‘guilty’ of a political opinion.”). (at 1042).

Political Opinion/Whistleblowing, Ukraine (2005). “Retaliation for investigating or publicizing corruption by political figures is by its very nature a political act. *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1245 (9th Cir. 1999).” (at 1042). The corruption being exposed must have “far reaching roots,” and “retaliation completely untethered to a governmental system does not afford a basis for asylum.” (at 1042–43; quoting *Grava v. INS*, 205 F.3d 1177, 1181 n.3 (9th Cir. 2000)). Exposing corruption within a private organization qualified as protected political activity where there were close ties between the organization and the government.

Nexus/Mixed Motive, Pre REAL ID, Ukraine (2005). “The requirement that persecution be ‘on account of’ political opinion ‘does not mean persecution *solely* on account of the victim’s

political opinion.” (at 1044; quoting *Borja v. INS*, 175 F.3d 732, 735 (9th Cir. 1999) (en banc) (quotation marks omitted; emphasis in original)). “That the Hidro officials may have been motivated in part by personal retribution does not mean that they did not also see [alien] as their *political* enemy. ... ‘In such instances, personal retaliation against a vocal political opponent does not render the opposition any less political, or the opponent any less deserving of asylum.’ *Grava*, 205 F.3d at 1181 n. 3.” (at 1044; emphasis in original).

Bars to Asylum/One Year Bar, Not Found, Ukraine (2005). “[T]he IJ believed that the one-year deadline was absolute and not subject to any exception.” (at 1040). “Had the IJ merely erred in making a determination ... we would lack jurisdiction. ... The jurisdiction-stripping provision ... only precludes us from reviewing ‘any determination’ with respect to the extraordinary-circumstances exception,” and it is “the failure to make a determination” which can be reviewed. (at 1039–40). *But cf. Lanza v. Ashcroft*, 389 F.3d 917, 921 (9th Cir. 2004) (A respondent’s misunderstanding of the law does not justify the extraordinary circumstance requirement: “Lanza claimed she had no need to apply for asylum because she thought she would be allowed to remain in the US through a spousal petition”).

✱ *Korablina v. INS*, 158 F.3d 1038 (9th Cir. 1998) (b) (6); reversing BIA’s denial of asylum upon finding past persecution and eligibility for withholding; remanding for discretionary grant of asylum; TROTT; distinguished by *Nagoulko v. INS*, 333 F.3d 1012 (9th Cir. 2003); *Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. Dec. 6, 2004).

Persecution/Discrimination, Not Affirmed, Ukraine (1998); Of Family, Not Affirmed, Ukraine (1998); Threats, Not Affirmed, Ukraine (1998); Physical Harm, Not Affirmed, Ukraine (1998). Jewish citizen of Ukraine suffered “persecution,” not mere “discrimination,” and thus established prima facie eligibility for asylum; citizen witnessed violent attacks by ultra-nationalists against Jews, she was tied to chair with noose around her neck and threatened with death, and, soon after she left Ukraine, her husband and daughter were attacked by persons who alluded to fact that they had been unable to find her.

Withholding of Deportation/Granted, Ukraine (1998). Alien was eligible for withholding of deportation, inasmuch as clear probability of persecution on basis of her Jewish heritage would exist if she were to return to Ukraine; members of alien’s family were severely beaten on account of their Jewish heritage soon after she left Ukraine, with specific threats made regarding her absence, and alien submitted numerous articles demonstrating that discrimination, harassment, and violence against Jews continued in Ukraine.

Unable or Unwilling to Control/Private Agent, Ukraine (1998). “Persecution may be found by cumulative, specific instances of violence and harassment toward an individual and her family members not only by the government, but also by a group the government declines to control. *Singh v. INS*, 94 F.3d 1353, 1358 (9th Cir. 1996) (citing *Shirazi-Parsa v. INS*, 14 F.3d 1424, 1428 (9th Cir. 1994)). ‘Discrimination, harassment, and violence by groups that the government is unwilling or unable to control can also constitute persecution.’ *Id.* at 1359 (citing *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988)). ‘Non-governmental groups need not file articles of incorporation before they can be capable of persecution.’ A single isolated incident may not ‘rise to the level of persecution, [but] the cumulative effect of several incidents may constitute persecution.’ *Id.*; see *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997).” (at 1044).

Vietnam

Chronology

✖ *Nguyen v. Holder*, 763 F.3d 1022 (9th Cir. 2014)

✓ ***Affirmed***

✖ ***Not Affirmed***

✖ *Nguyen v. Holder*, 763 F.3d 1022 (9th Cir. 2014) (b) (6); reversing a denial of CAT relief to an individual who had been convicted of “misuse of a passport to facilitate an act of international terrorism.” *Id.* at 1024. This was found to be categorically a CIMT. *Id.* at 1028. Credibility was not an issue. Respondent had been “a prominent member of the [group] Government of Free Vietnam.” *Id.* at 1025. As such, he became involved in a series of actions against that government including attempts to bomb Vietnamese Embassies in different countries. *Id.* The key issue in the case was whether the administrative record “compels the conclusion that Nguyen is more likely than not to be tortured if he is removed to Vietnam.” *Id.* A “retired Harvard Law School research fellow” who testified on behalf of the government that “Nguyen was unlikely to be tortured” in Vietnam had his point of view rejected. *Id.* at 1026. PREGERSON. There was a dissent by TALLMAN.

CAT/More Likely Than Not, Found, Vietnam (2014). The majority decision characterizes Vietnam’s human rights record as “dismal.” *Id.* at 1027. The administrative decision had been based on Nguyen’s failure to “point to any substantial evidence corroborating his fear that the Vietnamese authorities have become aware of his conviction in the Philippines [for attempting to blow up a Vietnamese embassy] or his other public activities in opposition to the Vietnamese regime.” *Id.* The Board of Immigration Appeals had further found that “the record . . . does not establish that such severe physical mistreatment is a common occurrence, or that it would more likely than not be inflicted on the respondent personally.” *Id.* The majority found that this assessment is not “supported by substantial evidence.” *Id.* at 1029. Relying on *Kamalthas v. INS*, the majority held that “documentary evidence of country conditions, alone, is sufficient to show that Nguyen is likely to be tortured in Vietnam.” *Id.* at 1031 (citing 251 F.3d 1279, 1280 (9th Cir. 2001) (“[C]ountry conditions alone can play a decisive role in granting [CAT] relief.”)).

CAT/Risk of Being Personally Tortured, Vietnam (2014). The court applied *Hosseini v. Gonzales*, in which another administrative denial of CAT relief had been reversed. *Id.* at 1031 (citing 471 F.3d 953, 960 (9th Cir. 2006)). *Hosseini* involved a citizen of Iran who had joined a “terrorist organization” in opposition thereto. *Nguyen*, 763 F.3d at 1032. The court in *Nguyen* found that in order for the respondent to succeed there was no obligation to demonstrate the

use of torture in Vietnam where the “documentary evidence alone” may generally show that the “country of removal tortures its political opponents.” *See id.* at 1033.

Yemen

Chronology

✓ *Almaghzar v. Gonzales*, 457 F.3d 915 (9th Cir. 2006)

✓ ***Affirmed***

✓ *Almaghzar v. Gonzales*, 457 F.3d 915 (9th Cir. 2006); affirming a denial of relief for a citizen of Yemen; The respondent had been convicted of a drug trafficking aggravated felony. The court determined that it did not have jurisdiction to consider whether he had been convicted of a particularly serious crime, thus rendering him ineligible for asylum or withholding of removal. The decision primarily speaks to the claim for CAT relief. The respondent was found not credible. He asserted various due process arguments with regard to the consideration of his evidence and the conduct of the IJ. Although the respondent was discredited, his documentation was not.; GOULD. There was a lengthy and vigorous dissent by FISHER.

CAT/Independent Evaluation Required. The majority decision has an extensive discussion of *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001). It summarized that case as follows: “Because the elements of a CAT claim are different from a claim for asylum, the *Kamalthus* court held that the BIA erred in relying on its previous adverse credibility determination in refusing to consider documentary evidence of torture” Even though “the IJ did not specifically discuss the documentary evidence in his oral decision,” his statement that he “has considered all of the evidence,” was sufficient to comply with his obligation to do so.

✗ ***Not Affirmed***

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